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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1892

BART B. CHAMBERLAIN, JR.,
Petitioner,

v.

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE, *et al.,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Bart B. Chamberlain, Jr., respectfully prays that a writ of certiorari issue to review and reverse the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 14, 1979, and the Order of that Court, entered June 15, 1979, denying rehearing.

OPINION BELOW

The opinion of the Court of Appeals, reported at 589 F.2d 827, appears as Appendix A-1 hereto. The unreported Order of the Court of Appeals denying rehearing appears as Appendix A-2. The final opinion

of the United States District Court for the Southern District of Alabama, reported at 419 F. Supp. 235, appears as Appendix B. The later, unreported Order of that court on Plaintiff's Motion For Additional Findings, Etc., appears as Appendix C hereto. The interlocutory orders of the United States District Court for the Southern District of Alabama, entered April 12, June 6, and August 19, 1974, appear in Appendix D1, D2, and D3, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 14, 1979. That Court's Order denying Petitioner's petition for rehearing was denied on June 15, 1979. This petition for certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF QUESTIONS PRESENTED

1. Whether Exemption 3 of the Freedom of Information Act (FOIA) converts the document disclosure provisions of 26 U.S.C. § 6103(e) and (e)(6) into a grant of authority to the Internal Revenue Service to excuse itself from otherwise applicable document disclosure requirements, and

2. If so, whether a mere statement by the IRS, phrased in the conclusory language of the statute, that disclosure would "seriously impair Federal tax administration," satisfies the criteria for exemption in the absence of an articulated explanation of the relationship between disclosure and the supposed impairment of governmental function?

3. Whether Freedom of Information Act investigatory, or other, exemptions permit agency suppression of documents created in the course of an investi-

gation carried on in violation of the agency's own regulations or for an otherwise improper purpose?

4. Whether, in the grant or denial of an attorney's fee award in Freedom of Information Act litigation, a court must consider the nature and volume of pre-judgment, as well as judgment-required, document production resulting from plaintiff's litigation activities; the extent to which Government document-withholding was unreasonable or contumacious, and whether plaintiff's action exposed agency improprieties?

STATUTORY PROVISIONS INVOLVED

Freedom of Information Act, 5 U.S.C. § 552, as amended

§ 552. Public Information; agency rules, opinions, orders, records, and proceedings

(a) . . .
(4) . . .
(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
. . .
(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under

this section in which the complainant has substantially prevailed.

* * *

(b) This section does not apply to matters that are—

. . .

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; . . .

Internal Revenue Code of 1954, 26 U.S.C. § 6103, as amended

§ 6103. Confidentiality and disclosure of returns and return information.

(a) *General rule.*—Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States, . . . shall disclose and returns or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) *Definitions.*—For purposes of this section—

(1) *Return.*—The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) *Return information.*—The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liability, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(3) *Taxpayer return information.*—The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such information relates.

(4) *Tax administration.*—The term "tax administration"—

(A) means—

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

* * *

(c) *Disclosure of returns and return information to designee of taxpayer.*—The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

* * *

(e) *Disclosure to persons having material interest.*—

(1) *In general.*—The return of a person shall, upon written request, be open to inspection by or disclosure to—

(A) in the case of the return of an individual—

(i) that individual . . .

(6) *Return information.*—Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

STATEMENT OF THE CASE

This case "presents novel and important questions under the Freedom of Information Act," *Chamberlain* v. *Kurtz,* 589 F.2d 827, 830 (5th Cir. 1979).

The case arose out of questionable practices of the Internal Revenue Service that included creation of a criminal fraud investigation to "reopen" a taxpayer's tax year on which the statute of limitations had run; and improperly classifying the taxpayer as a "racketeer" in order to facilitate creation of that fraud charge.

The case began in February 1973 with a request for documents submitted to the Internal Revenue Service (IRS) by Petitioner, Bart B. Chamberlain, Jr. (Chamberlain), an Alabama businessman. When IRS refused to produce most of the documents requested, Chamberlain filed suit under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). Before the District Court case concluded with the entry of summary judgment, there ensued almost three years of repetitive, time-consuming and costly efforts by Chamberlain to obtain identification and production of documents by the IRS; and repeated failure and refusal by the IRS

to identify or produce. IRS maintained, throughout the litigation, its basic stance of opposition to document identification or production although no colorable basis existed for withholding most of the documents it withheld. For example, one of the IRS' affidavits contained such descriptions of *withheld* documents at "190 pages of information furnished by Mr. Chamberlain, 52 pages of correspondence with the United States Department of Justice . . .," "94 pages of miscellaneous correspondence relating to Mr. Chamberlain and related taxpayers . . .," "copies of complaints and answers in civil litigation not involving federal taxes" (Record, 236-42 (hereinafter "R. ——")).

After IRS' repeated submission of admittedly inaccurate document descriptions, and its ultimate piecemeal, prejudgment production of a substantial volume of documents under pressure from Chamberlain and the District Court (Appendix D), the IRS ultimately submitted a final document description to the District Court, together with the remaining undisclosed documents (a minority of those originally in issue) for *in camera* inspection (R. 258-59, 300). The District Court then directed revelation of some of the remaining documents and the withholding of others (Appendix B).

Chamberlain's attorney's fees for the three-year running battle to compel IRS document descriptions and production, exceeded $100,000.

On not less than three occasions, the District Court entered orders castigating the IRS for its flouting of applicable law and the court's orders. (See Appendix D hereto).

The IRS' reluctance and procrastination over the years of the litigation is explained by the contents of the documents ultimately disclosed. They revealed that, in 1971, IRS employees had created a criminal fraud "investigation" of Chamberlain, (J. App., 584),[1] in violation of IRS' own rules, thereby reopening the limitations period that they had negligently allowed to run on Chamberlain's 1966 tax year! (J. App., 585-587). That investigation created the opportunity for IRS to revise and force settlement of its substantial claim against Chamberlain for his asserted 1966 tax liability.

Chamberlain had been the sole general partner of Citronelle-Mobile Gathering System Company, Ltd. (Citmoco), an Alabama limited partnership. In 1965 and 1966 Citmoco made payments to a public relations firm as campaign contributions to a candidate for the United States Senate. The payments were then unintentionally posted and reported as business expenses on Citmoco's income tax returns. When Chamberlain himself became aware of the improper accounting treatment, he had that fact reported to the local IRS office (J. App., 575).

Before Chamberlain reported that information, however, an IRS Revenue Agent had learned, through an audit, of the payments and their improper accounting treatment. In March 1970 the Revenue Agent had referred the matter to the IRS Intelligence Division for a criminal fraud investigation. Special Agent Burch was assigned to the investigation (J. App., 582-

[1] The Joint Appendix on appeal contains material not included in the Record in the District Court. Where reference is made to such material, it will be cited as "J. App. —."

583, 568). There was then pending a general IRS investigation into improper political contributions in Alabama, known as the "Alabama Project." (J. App., 593-594; 560). Special Agent Burch concluded his full-scale criminal investigation with a July 8, 1970 decision against prosecution, in which his chief concurred on July 9 (J. App., 564). That criminal investigation was then terminated. At the time of Burch's investigation, Chamberlain had been unaware of the existence, and the nature, of that investigation.

Two months after the Burch fraud investigation was closed, the Revenue Agent discovered that he had inadvertently permitted the statute of limitations to run on Chamberlain's 1966 tax year. His supervisor was particularly concerned because his career, like his subordinate's, was jeopardized as a result of that negligence. (J. App., 585-592). The supervisor then suggested reviving the fraud charge against Chamberlain (a fraud charge would toll the statute of limitations and thus reopen the 1966 year to permit all claims to be asserted, whether or not fraud-related). (26 U.S.C. § 6531.) (J. App., 590).

The Internal Revenue Manual authorizes reopening a closed fraud investigation only by a District Director, or by a new referral from the Audit Division to the Intelligence Division based on newly discovered evidence; IRM 4565.7(6); 4565.22(7). No referral was made by the District Director and no new evidence had developed. Nevertheless, a new fraud investigation was created in January 1971, (J. App., 578-580), even though the previous full-scale investigation of the same matter had been closed with "no ID pot." [no Intelligence Division potential]. (J. App., 580). One technique IRS used to fabricate a "legal" justification for the new "investigation" was the factually baseless classification of Chamberlain as a "racketeer".[2]

The second "investigation" was ultimately concluded with a determination that no criminal action was warranted. (J. App., 559).

Although Chamberlain had not known of the 1970 (Burch) investigation, IRS made him aware of the second "investigation" early in its life. Chamberlain took the position below, as the facts were slowly revealed by IRS, and he now takes the position, that the second "investigation" was itself an extortion device, and that documents created as a part, or in furtherance, of such an investigation could not be shielded by any FOIA exemption.

In March 1976 the District Court entered summary judgment directing disclosure of some of the relatively small number of documents still remaining in issue, while permitting Government withholding of others. It directed that "costs shall be taxed against the defendants." When Chamberlain later moved for attorney's fees as the "substantially prevailing party," however, the District Court denied that motion, and added a finding, contrary to that sought by Chamberlain, that

> "The [second] investigation was not initiated or carried out with the intent of concealing nor *just to avoid* the effects of the expiration of the civil

---

[2] Internal Revenue Manual, § 9417, provides that income tax returns of "taxpayers who are presently classified as racketeers shall be retained by the Intelligence Division for appropriate action, and that the District Chief of Intelligence Division will initiate an Intelligence investigation in any case which appears to possess criminal potential."

statute of limitations for the year 1966." Appendix C. (Emphasis added.)

The parties cross appealed. During the pendency of the appeal, the Congress enacted two statutes that were held, by the Fifth Circuit, to be controlling in this case. They are:

1. The amendment enacted September 13, 1976 to Exemption (b)(3) of the Freedom of Information Act, 5 U.S.C. § 552(b)(3) (effective March 12, 1977), intended to override this Court's restrictive decision in *Administrator, FAA* v. *Robertson,* 422 U.S. 255 (1975). *Robertson* had sustained the FAA Administrator's reliance on Exemption 3 as it stood in 1975 to protect certain documents from disclosure;

2. 26 U.S.C. § 6103, an amendment to the Internal Revenue Code designed primarily to protect taxpayers from unwarranted or improper IRS disclosure of their tax returns or other return information to third parties; subsections (c) and (e)(6) of the statute expressly authorize disclosure of such information at the taxpayer's request; *supra,* pp. 6-7.

IRS first raised amended § 6103(c) and (e)(6) as a defense in its brief to the Fifth Circuit in January 1977 after Chamberlain's principal brief to that court had been filed. When Chamberlain's reply brief called to IRS' attention the absence of regulations required by the statute, as well as the lack of the required findings by the Secretary that disclosure would seriously impair Federal tax administration, IRS, in April 1977, created an affidavit (but no regulations) of the

Acting Commissioner of Internal Revenue purporting to resolve the entire matter on the basis of his conclusory statement:

"... that release of the above-mentioned documents would seriously impair federal tax administration. On the advice of counsel, I am therefore stating that release of these documents is prohibited by § 6103(e)(6) of the Internal Revenue Code of 1954."

The Fifth Circuit handed down its opinion on February 14, 1979, concluding that the specificity requirements of Exemption 3(B) of the Freedom of Information Act, as amended to broaden disclosure, are satisfied by § 6103(c) and (e)(6) of the Internal Revenue Code, as amended. That court failed to consider whether the Acting Commissioner's conclusory affidavit was adequate to invoke § 6103. The Court of Appeals further concluded that FOIA exemptions applied to documents created in the course of IRS' second "investigation" of Chamberlain, whether or not the alleged investigation was improper; and it sustained the District Court's denial of any attorney's fees.

The Fifth Circuit denied rehearing on June 15, 1979.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Novel and Unsettled Issues Respecting the Conflict Between the New Document Disclosure Requirements of Freedom of Information Act Exemption 3 and the New Provisions of Internal Revenue Code § 6103(c) and (e).

The Fifth Circuit's decision effectively gives the Commissioner of Internal Revenue *carte blanche* to exempt virtually all Revenue Service files from FOIA disclosure. While other courts have dealt with the relationship to Exemption 3 of other subsections of new

§ 6103, none has dealt with the interplay of Exemption 3(B) of the FOIA with §§ 6103(c) and (e)(6) which, in conjunction, potentially affect any FOIA request for any Internal Revenue Service documents.

The importance of this issue to the continued vitality of Congressional policy embodied in the FOIA merits the attention of this Court. Under the holding of the Court of Appeals, the Internal Revenue Service is virtually immunized from disclosure to taxpayers of information in or pertaining to, their own records!

Section 6103 of the Internal Revenue Code was revamped in 1976 for the express purpose of protecting taxpayers from unwarranted invasion of their privacy by Government officials.[3] Subsections (c) and (e)(6) however, which deal with disclosure requested or authorized by the taxpayer, encourage rather than bar disclosure.

Shortly before § 6103 was amended in 1976, Congress amended Exemption 3 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3). That amendment was designed to mitigate the impact of this Court's decision in *Administrator, FAA* v. *Robertson,* 422 U.S. 255 (1975). Original Exemption 3, as applied in that case, had protected from disclosure "documents specifically exempted from disclosure by statute." This Court, in *Robertson,* sustained the Administrator's withholding of documents in reliance on 49 U.S.C. § 1504, which required him to withhold certain classes of documents under specified circumstances, if he

[3] S.Rep. No. 94-938, pp. 315 *et seq.*, reprinted in 1976 U.S. Code Cong. & Ad. News 3744, *et seq.* (94th Cong., 2nd Sess.); H. Rep. No. 94-1515, pp. 475, *et seq.*, reprinted in 1976 U.S. Code Cong. & Ad. News 4180, *et seq.*

found that "disclosure . . . would adversely affect the interests of [the person who provided the document to the Administrator] and is not required in the interest of the public."

Exemption 3, as amended, so far as pertinent here, limited the permissible scope of non-disclosure to those documents specifically exempted from disclosure by another statute only if that statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld"; p. 4, *supra.* Exemption 3, as so amended, implies "a Congressional sense that the crucial distinction lay between statutes that in some manner *told* the official what to do about disclosure and those that did not significantly inform his discretion in that regard." *American Jewish Congress* v. *Kreps,* 574 F.2d 624, 629 (D.C. Cir. 1978).

26 U.S.C. §§ 6103(c) and (e)(6) do not significantly inform the Administrator's discretion. They *authorize* disclosure by the Secretary of the Treasury or his designee of a taxpayer's "return information" except "if the Secretary determines that such disclosure would seriously impair Federal tax administration."[4]

"Tax administration" is broadly defined by the statute to cover virtually any IRS activity, § 6103(b)(4), pp. 5-6, *supra.* "Return information" is defined as virtually any IRS information relating to a taxpayer other than his tax return. But the limited nature of the Congressional concern that gave rise to the pro-

[4] See the distinctions made between these and other subsections of § 6103 in *Fruehauf Corp.* v. *IRS,* 566 F.2d 574 (6th Cir. 1977), at 578, n.4.

tective aspect of the statute is revealed by the final clause of the definition, *i.e.*,

> "[t]hat term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." § 6103(b)(2), p. 5, *supra.*

Section 6103(c) subjects the Secretary's functions under that provision "to such requirements and conditions as he may prescribe by regulations." While subsection (e)(6) contains no such explicit requirement for regulations, the Fifth Circuit found the two provisions "functionally identical"; Appendix A, pp. 13a-15a. No regulations had been prescribed when the case was submitted to the Fifth Circuit.[6]

The flaccid authorization under § 6103(c) and (e)(6), to decide whether disclosure of documents in IRS' custody would "seriously impair" IRS functions, falls short of Exemption 3's requirement for specific statutory criteria. It is questionable whether the § 6103 provisions establish any more certain a standard than did *Robertson's* "not required in the interest of the public." The contemporaneous view of the Congress appears to be that they do not. House Conference Report No. 94-1441 reported with respect to the agreed-upon amendment to Exemption 3:

> "The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson,* 422 U.S. 255 (1975), which dealt with § 1104 of the Federal Aviation Act of 1954 (49 U.S.C. § 1504). *Another example of a statute whose terms do not bring it within this exemption is § 1106 of the Social Security Act* (42 U.S.C. 1306)." H.Rep. No. 94-1441, at 25; reprinted in 1976 U.S. Code Cong. & Ad. News 2261 (94th Cong., 2nd Sess.) (Emphasis added).

[6] Temp. Reg § 404.6103(c)-1(c), promulgated while this case was pending in the Fifth Circuit, merely repeats the statutory language. 26 CFR § 404.6103(c)-1(c).

Section 1106 of the Social Security Act is concerned with tax returns or related information in the hands of the Secretaries of Labor and of Health, Education and Welfare. The first subsection of that statute bars disclosures except as those Secretaries "may by regulations prescribe." Subsection (b) *permits* disclosure of information "authorized by regulations prescribed pursuant to subsection (a)" but only "subject to such limitations as may be prescribed by the [Secretaries] . . . to avoid undue interference with their respective functions under this chapter. . . ."

Thus, like § 6103(c) and its "functionally identical" twin, § 6103 (e)(6), § 1106 of the Social Security Act permits disclosure subject to administrative regulations. Like those subsections, § 1106 authorizes withholding if the involved Secretary should determine that disclosure would unduly interfere with, *i.e.*, impair, the agency's functions. Both statutes accord the administrator discretion to decide by regulation, as well as by *ad hoc* order, that revelation need not be made if it would interfere with, or impair, agency functions.

The analogy between the statutes is apparent, as is the conflict between the views of the Court of Appeals and the clearly stated Congressional intent.

II. The Decision Below Raises the Significant Issue What Limits, If Any, Control the Discretion of the Internal Revenue Service to Exempt Itself From the Freedom of Information Act.

A determination that disclosure of documents requested would "seriously impair Federal tax adminis-

tration" is a necessary condition precedent to the activation of FOIA Exemption (3) by application of 26 U.S.C. §§ 6103(c) and (e). That determination is unquestionably committed by the statute to the "primary jurisdiction" of the tax administrator.

The important issue avoided by the Fifth Circuit here is whether the mere conclusory statement of the administrator that disclosure would "seriously impair tax administration" is alone sufficient to activate Exemption 3; whether the exemption may be invoked by the mere conclusory *ipse dixit* of the administrator, or whether the exemption's invocation must depend upon specific reviewable statements articulating reasons why the revelation of specific documents or categories of documents would, in fact, seriously impair federal tax administration.

If, as the Fifth Circuit implicitly decided, the mere conclusory determination in the language of the statute is sufficient, then the administrator has been given *carte blanche* to exempt from discovery virtually any document that he chooses, within his nationwide domain, that falls within the broad scope of "return information." The Commissioner of Internal Revenue would have the unfettered discretion to negate the Freedom of Information Act as it applies to "tax administration." The statutory term "tax administration" covers virtually the entire gamut of IRS functions. Because of the broadness of that definition; the broadness of the statutory definition of "return information" covered by the exempting power, and because of the ubiquity of Internal Revenue Service involvement in national life, the issue of the administrator's self-exempting power is an important one.

His self-serving disposition of this case is instructive:

The Acting Commissioner of Internal Revenue exercised the exempting powers given him by § 6103 (e) (6), by a conclusory affidavit (pp. 12-13, *supra*) submitted at virtually the last stage in the appellate phase of the Fifth Circuit litigation—as an appendix to the Commissioner's Reply Brief. Relying on that affidavit, the Fifth Circuit concluded "that the IRS has sustained its burden by *demonstrating* that the release of the documents would result in serious *impairment of the effort to collect back taxes and penalties from Chamberlain,*" Appendix A, at 23a (emphasis added). There was, in fact, no "demonstration" of any such fact in the affidavit, or elsewhere in the record. Rather, the certification of the interim Acting Commissioner of Internal Revenue merely stated, in pertinent part:

> "4. *Some of these documents* contain predecisional intra-agency advice, the disclosure of which would be detrimental to the government decision-making process. *Other documents* are attorney work product and attorney-client communications, the disclosure of which would undermine the ability of attorneys to assure confidentiality to their clients.
>
> "5. I have determined that release of the above-mentioned documents would seriously impair Federal tax administration. *On the advice of counsel, I am therefore stating* that release of these documents is prohibited by § 6103(e)(6) of the Internal Revenue Code of 1954." (Emphasis added.)

The Acting Commissioner's Paragraph 5 reports nothing except his conclusory determination, in the language of the statute, that release of *some* of the

documents, that he never specifically identifies "would seriously impair Federal tax administration" in ways he does not describe, and that "on the advice of counsel [presumably his counsel in this litigation] I am *therefore* stating that release of these documents is prohibited by § 6103(e)(6). . . ."

Paragraph 4 of the affidavit reveals that the determination deals with the anticipated, but unspecified, impact of the release of unidentified documents containing "pre-decisional intra-agency advice" and "attorney work product and attorney-client communications." The "demonstration" is thus no more than the administrator's *ex parte* conclusion that Exemption 5 of the Freedom of Information Act[6] applies to the unidentified documents. Significantly, the Acting Commissioner's affidavit totally ignored the clear-cut FOIA requirement, and its statutory analog in 26 U.S.C. § 6103[7] to segregate documents or portions of documents, for purposes of determining the propriety of disclosure. *EPA* v. *Mink*, supra; *Mead Data Central, supra;* the FOIA, 5 U.S.C. § 552(b), as amended by Pub.L. No. 93-502, § 2 (1974).

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[6] Exemption 5 exempts from disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;" 5 U.S.C. § 552(b)(5). The claims of privilege made by the Acting Commissioner in Paragraph (4) of his affidavit have traditionally ben treated by the Courts as Exemption 5 issues. *See, e.g., NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *EPA* v. *Mink*, 410 U.S. 73 (1973); *Mead Data Central, Inc.* v. *U.S. Dept. of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977).

[7] The statutory definition of "return information" expressly excepts from that protectible classification "data in a form which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer."

The Fifth Circuit accepted the Acting Commissioner's invitation to abandon its judicial function to him, and to make the leap of faith from his initial Exemption 5 conclusion to the assumption that the unspecified effect of revelation of the unidentified and unsegregated documents must be impairment of federal tax administration in undescribed, and possibly indescribable ways.

If the decision below is permitted to stand, the IRS can fall back on the Exemption 3—§ 6103 linkage to exempt virtually all of its business from all aspects of the FOIA.

No doubt, the determination whether revelation of a particular document or class of documents would seriously impair tax administration ought to be, as § 6103 suggests, a matter within the "primary jurisdiction" of the tax administrator. Courts are not tax administrators; nor are they competent to make decisions in the first instance about the factors that would, or might, impair tax administration. But no statutory provision bars judicial review of the initial administrative decision. Courts are competent to analyze an articulate administrative decision, and determine whether it proceeds rationally from premise to conclusion.

The Fifth Circuit's unquestioning acceptance of the certification presented here is totally inconsistent with this Court's, and other judicial, views of the specificity necessary for a Government agency to withstand judicial examination of a claim of executive privilege to conceal documents; see, *e.g., Kerr* v. *United States District Court*, 426 U.S. 394 (1976); *United States* v. *Reynolds*, 345 U.S. 1 (1953); *Black* v. *Sheraton Corporation of America*, 564 F.2d 531 and 550 (D.C. Cir. 1977);

Carl Zeiss Stiftung v. *VEB Carl Zeiss, Jena,* 40 F.R.D. 318 (D.D.C. 1966), *aff'd* 384 F.2d 1979, *cert. denied,* 389 U.S. 952 (1967).

Although in some cases *in camera* revelation of documents withheld might remedy this kind of defective executive certification, that cannot be true where, as here, the issue is one within the peculiar competence of the administrator.

In those circumstances the mere *in camera* revelation of the documents to the inspecting court could be expected to provide no rational basis for judicial review of the administrative determination. Absent an articulated explanation of the basis for the administrative determination, the reviewing court totally lacks a basis for insight into the supposed expertise of the administrator to determine whether the administrative power was lawfully exercised. *See, e.g., SEC* v. *Chenery Corp.,* 318 U.S. 80 (1943). *Cf., Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S 402 (1971).[8]

III. The Decision Below Raises the Novel Issue Whether FOIA Exemptions Permit Concealment of an Agency's Violations of Its Own Regulations or of Wrongdoing Otherwise.

Agency violations of their own rules are recurring and pervasive phenomena. This Court has not ruled on the question whether the public interest, as expressed

[8] Questions of competence aside, the course followed by the Acting Commissioner fails even under routine FOIA analysis. Courts have consistently rejected the invitation of the government to do its work for it on the basis of a bald claim of exemption coupled with the submission of documents for *in camera* review. *E.g., Mead Data Central, Inc.* v. *U.S. Dept. of the Air Force,* 566 F.2d 242, 260-61 (D.C. Cir. 1977). *See, Vaughn* v. *Rosen,* 484 F.2d 820, 825-26 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974).

in the FOIA, permits agencies to conceal their improprieties behind FOIA exemptions.

The issue presented here is quite different from that considered and recently disposed of by this Court in *United States* v. *Caceres,* —— U.S. ——, 59 L.Ed.2d 733 (1979). That case considered the question whether a Government agency's violation of its own rules warranted suppression by a criminal defendant of the improperly obtained evidence that the Government sought to disclose and use at trial. Here, on the other hand, the Government, in a civil document disclosure case, is seeking the "suppression" of embarrassing evidence of its own wrongdoing.

IRS reopened its criminal "investigation" of Chamberlain in 1971 in violation of the specific provisions of the Internal Revenue Manual that limit the reopening of closed fraud investigations to specified circumstances, that were not present here. (Internal Revenue Manual (IRM) § 4565.7). Moreover, with no evidence to sustain its action, the Internal Revenue Service then also classified Chamberlain as a "racketeer," since that classification authorizes initiation of "an intelligence investigation in any case which appears to possess a criminal potential" (IRM § 9417).

Neither Court below contradicted the conclusion that the new criminal investigation would not have been opened, but for the embarrassment of local IRS personnel at their prior negligence in permitting the statute of limitations to run on Chamberlain's 1966 tax year.

Chamberlain took the position, at every stage of the case below, that the IRS' violation of its own regulations, as well as its wrongdoing otherwise, barred IRS

reliance upon the "investigatory" exemption (FOIA Exemption 7) or indeed, on any FOIA exemption to avoid production of documents created as a part, or in the course, of the improprieties alleged. Neither court below chose to address the issue created by IRS' violation of its own regulations. The District Court concluded that the second investigation was not initiated or carried out with the intent of *concealing* the expiration of the statute of limitations for 1966, and was not initiated or carried out "*just* to avoid the effects of" that expiration (Appendix C, at 52a.) The Court of Appeals deemed those matters immaterial to disposition of the case. Indeed, it never squarely addressed the issue of regulation violation or the impropriety of Chamberlain's "racketeer" classification. It simply said:

> "If the IRS sought to establish the existence of fraud so as to reopen the entire 1966 tax year, this would not transform an otherwise legal and proper investigation into an illegal inquiry. It is the duty of the IRS to collect taxes and to investigate possible defalcations of taxpayers in the reporting and payment of taxes. Moreover, Chamberlain places an unwarranted emphasis on the Intelligence Division's initial withdrawal from the case, which was merely one step in an internal process of deciding how to deal with a particular case"; Appendix A, at 10a.

The Fifth Circuit thus failed to dispose of another important Freedom of Information Act issue not yet decided by this Court. That disposition is at odds with earlier decisions of this Court, and lower courts, on related issues that clearly point the way to the disposition of this one; *e.g., Service* v. *Dulles,* 354 U.S. 363 (1957); *United States ex rel. Accardi* v. *Shaughnessy,*

347 U.S. 260 (1954). *See, Weissman* v. *CIA,* 565 F.2d 693 (D.C. Cir. 1977).

In *Accardi* this Court vacated a deportation order because the deciding agency violated its own regulations and procedures. In *Service,* this Court upheld an attack upon the validity of State Department personnel action on the grounds that the Secretary had disregarded internal regulations held binding upon the Secretary as upon the citizen; *see also Vitarelli* v. *Seaton,* 359 U.S. 535 (1959). In *Yellin* v. *United States,* 374 U.S. 109 (1963), this Court reversed a conviction for contempt of Congress on the grounds that the involved Congressional Committee had improperly denied Yellin good faith consideration of his request to be heard in executive session in violation of the Commission's own rule which provided for executive interrogation. Although the Court of Appeals in *Yellin* had held that the Committee rule conferred no rights on the witness, this Court ruled otherwise and reversed the conviction. The Fifth Circuit itself in *Gulf States Manufacturers, Inc.* v. *NLRB,* 579 F.2d 1298 (5th Cir. 1978), a case with facts uniquely analogous to this one, held the Labor Board bound by its own internal case-handling manual where that Board had reopened a previously closed case in violation of the manual. *See also, Morton* v. *Ruiz,* 415 U.S. 199 (1947).

This Court's recent decision in *United States* v. *Caceres* reinforces this view. The Court, in *Caceres,* although holding that suppression of probative evidence in a criminal proceeding is an inappropriate sanction for violation of IRS regulations, nevertheless spoke approvingly of the foregoing line of cases. —— U.S. ——, 59 L.Ed.2d 733, at 743, n.14. Unlike *Caceres,*

the Petitioner here seeks production, not suppression. Unlike *Caceres,* the violation of the regulation here was deliberate and prejudicial. Cf., —— U.S. ——, 59 L.Ed.2d 733, at 738. Unlike *Caceres,* this is "an APA case and the remedy sought is . . . invalidation of the agency action." *Cf.,* —— U.S. ——, 59 L.Ed.2d 733, at 745. This is a civil FOIA case, not a criminal prosecution; but it concerns the Government's attempt to suppress its wrongdoing in a criminal investigation. *Cf.,* —— U.S. ——, 59 L.Ed.2d 733, at 745, 746.

The issue here is intimately related to the issues disposed of in such cases as *Accardi, Dulles, Yellin, et al.* Here, as in those cases, the Government agency violates its own regulations to the detriment of those affected and, by its action, poses the issue whether it should be rewarded for its impropriety.

In *Weissman* v. *CIA,* 565 F.2d 692 (1977), the Court of Appeals for the District of Columbia Circuit held that documents obtained in the course of an investigation carried out in violation of limitations in an agency's organic statute were not entitled to the concealment that would otherwise have been afforded by the investigatory exemption of the FOIA, Exemption 7. The same considerations that warranted that decision bar concealment of documents created in the course of agency impropriety, whether by way of statute violation, regulation violation, or otherwise. The very purpose of the Freedom of Information Act, as originally enacted and as amended, is totally antithetical to the concept that the statute may protect from disclosure Government stupidity, Government venality, Government ineptitude, Government inefficiency, or Government law violation; see, *e.g., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles,* U.S. Senate Document No. 93-82 (93rd Cong., 2nd Sess. 1974), pp. 36, *et seq.*

IV. The Conflict Between the Clearcut Congressional Intent, and Appellate Court Decisions, on Attorneys' Fees Awards to FOIA Litigants Requires Authoritative Disposition by This Court.

The decision below raises the substantial issue whether the "sound discretion" of the Courts in disposing of FOIA attorneys fee claims is so limitless, as to permit them to ignore the expenditures of time, money and effort by, and the success of, FOIA litigants in compelling production of documents unreasonably withheld, and particularly where the litigant may have initially brought the action for private purposes.

The 1974 amendments to the Freedom of Information Act provide:

> "The court may assess against the United States reasonable attorney's fees and other litigation costs reasonably incurred *in any case under this section* in which the complainant has substantially prevailed"; 5 U.S.C. §552(a)(4)(E). (Emphasis added.)

That provision is one of the many 1974 amendments designed to overcome Government agency reluctance and refusal to comply with the requirements of the original statute.[9]

[9] Other provisions directed at Government delay or recalcitrance included an administrative deadline for actions on requests, reporting of denials and the like to Congress, expanded authority for *in camera* review by District Courts, and restrictions upon the exemption for law enforcement purposes; 5 U.S.C. §§ 552(a)(4)(B); (a)(6); (b)(7); (d).

The stated Congressional reason for authorization of attorney's fees awards was to "discourage unreasonable litigation by the Government undertaken for no good reason except to make as burdensome as possible the effort of a citizen to acquire information by his Government"; 120 Cong. Rec. 17021 (daily ed. May 30, 1974). The intent was that:

> "A person who must sue to obtain access to information may recover attorney's fees if he prevails in court"; 120 Cong. Rec. at S17828 (daily ed. Oct. 1, 1974).

Chamberlain succeeded in this case, against the continuing, judicially recognized, recalcitrance of IRS, in extracting, prior to judgment, a substantially greater number of documents than those that ultimately remained for disposition on final judgment.[10] The Government's own descriptions of the documents produced prior to judgment show the frivolous nature of much of the Government's initial withholding.[11] That pre-judgment production also revealed IRS' improper violations of its own procedural regulations in fabricating the second Chamberlain criminal investigation.

The Fifth Circuit, like the District Court, ignored that substantial pre-judgment production in considering a fee award and concluded that, it would not disturb the "sound discretion of the District Judge" in denying attorney's fees. Appendix A, at 26a-28a.

The Court of Appeals assumed that a "public benefit" must be inherent in the nature of the documents produced, in order to justify an attorney's fees award;

[10] Appendix D; pp. 8-9, *supra*.

[11] See page 8, *supra*.

(Appendix A, at 27a). Because that court considered only the relatively minor proportion of documents that remained in issue for ultimate disposition, it never considered the question whether Chamberlain's success in obtaining massive pre-judgment release of documents unreasonably withheld, merited consideration of a fee award.

While some lower courts have paid lip service, for fee granting purposes, to a plaintiff's pre-judgment success in overcoming Government recalcitrance, the role of that sort of success by FOIA litigants generally, for fee granting purposes requires definitive determination; *see, Nationwide Building Maintenance, Inc.* v. *Sampson,* 559 F.2d 704 (D.C. Cir. 1977); *Cuneo* v. *Rumsfeld,* 553 F.2d 1360 (D.C. Cir. 1977); *Vermont Low Income Advocacy Council, Inc.* v. *Usery,* 546 F.2d 509 (2nd Cir. 1976). *Compare, Jones* v. *United States Secret Service,* —— F.Supp. ——, C.A. No. 78-891 (D.D.C. Feb. 28, 1979); *Exner* v. *Federal Bureau of Investigation,* 443 F.Supp. 1349 (1978). The need is even more compelling for disposition of the ultimate attorney's fee issue in private plaintiff cases; that is, whether any plaintiff initially concerned with vindicating personal interests may be granted a fee under any circumstances and, if so, whether production of documents intrinsically beneficial to the public is a *sine qua non* to an award.

Courts of Appeals, in the main, have taken a position in direct conflict to the stated intent of Congress. They have deemed entirely dispositive of private interest plaintiff fee claims the fact that documents obtained

have not, in and of themselves, represented matters of great public interest.[12] *E.g., Cuneo* v. *Rumsfeld, supra.*

The stated Congressional reason for authorizing attorney's fees awards was to discourage unreasonable Government litigation under FOIA, which is one of that class of statutes creating "private attorneys general" to vindicate rights deemed to be of public importance; *cf., Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), especially at 247 and 260, n.33. The "existing body of law" upon which the Congress expressly chose to rely in enacting the attorney's fee provision (Conference Report S.Rep. No. 93-1200 set out in 1974 U.S. Code Cong. & Ad. News 6285, 6288 (93d Cong., 2d Sess.), creates a presumption that fees will be awarded to the prevailing party unless such an award would result in manifest injustice; *see, e.g., Bradley* v. *Richmond School Board,* 416 U.S. 696 (1974); *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968). The very concept of the "private attorney general" derived from an express recognition that a private person, participating in a case to vindicate a selfish, indeed a commercial, interest, could nevertheless simultaneously vindicate the public interest; *Associated Industries of New York* v. *Ickes,* 134 F.2d 694 (2nd Cir. 1938); *see also, Sierra Club* v. *Morton,* 405 U.S. 727, 737-39 (1972). Congress has frequently directed an award of attorney's fees to selfishly prevailing parties on the theory that the mere success of the private litigator will vindicate a public interest. The

[12] N.B. that the Government itself appears to take a more generous view, having stipulated to a grant of interim attorney's fees of $195,802.50 in *Meeropol* v. *Levi,* C.A. No. 75-1121 (D.D.C.). The Plaintiffs' interests in that FOIA case were essentially personal in nature.

attorney's fees provisions of the Clayton Act, 15 U.S.C. § 15, are perhaps the most commonplace example.

Courts, since 1974, have flirted with, but rejected, the idea of compliance with the Congressional intent, *see, e.g.,* the opinion of the Fifth Circuit in *Blue* v. *Bureau of Prisons,* 570 F.2d 529 (1978):

> "It is doubtless true, as the D.C. Circuit has suggested, that the successful FOIA plaintiff always acts in some degree for the benefit of the public both by bringing Government into compliance with the FOIA disclosure policy and by securing for the public at large 'the benefits assumed to flow from the public disclosure of government information.' *Cuneo* v. *Rumsfeld,* 180 U.S. App. D.C. 184, 191, 553 F.2d 1360, 1367 (1977)." 570 F.2d, at 533.

This view, which both the *Cuneo* and *Blue* courts ultimately rejected, appears nevertheless to have been precisely the intent of the Congress as expressed in the above-quoted excerpts from the legislative history. The reasons for that Congressionally expressed intent was made clear by the Senate's sponsor of the 1974 amendments:

> "[I]t is still an uphill battle with the Government agencies and their deeply entrenched penchant for secrecy. There are blatantly unnecessary delays and purposeful frustrations.
>
> ". . . There is nitpicking over identification and there is bargaining over exemptions. There are lengthy and costly court fights.
>
> ". . . This is not the intent of the Freedom of Information Act. This is not what is meant by citizens' access in an open government.
>
> "The amendments . . . will provide . . . the necessary tools to break down the traditional bureau-

cratic barriers of secrecy . . ." (120 Cong. Rec. S17020 (daily ed. May 30, 1974)).

One of those "tools" was the award of attorney's fees.

Respectfully submitted,

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APPENDIX

APPENDIX A-1

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 76-2336

BART B. CHAMBERLAIN, JR., ETC.,
Plaintiff-Appellee-Cross Appellant,

v.

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE, ET AL.,
Defendants-Appellants-Cross Appellees.

Feb. 14, 1979

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Appeals from the United States District Court for the Southern District of Alabama.

Before JONES, AINSWORTH and HILL, *Circuit Judges.*

AINSWORTH, *Circuit Judge:*

This appeal presents novel and important questions under the Freedom of Information Act (FOIA)[1] in connection with a taxpayer's suit for the production and disclosure of certain Internal Revenue Service (IRS) information and documents. The IRS contends that under statutory provisions of the FOIA and under section 6103 of the Internal Revenue Code of 1954, as amended,[2] the documents at issue are exempt from disclosure. Bart W. Chamberlain brought this action under the FOIA to obtain from the IRS various documents compiled in the course of criminal and civil fraud investigations of Chamberlain's federal income tax returns for 1965 and 1966. The IRS resisted disclosure of most of the documents sought by plaintiff. On cross-motions for summary judgment the dis-

[1] 5 U.S.C. § 552 (1976).

[2] 26 U.S.C. § 6103 (1976).

trict court, after a review of detailed affidavits describing the documents and *in camera* inspection of the documents themselves, entered a comprehensive order directing that some documents be disclosed in their entirety, some be disclosed in part and withheld in part and some be withheld entirely.[3] The case comes before us on cross-appeals, the Government challenging the district court's order insofar as it mandates the disclosure of six specific documents and Chamberlain challenging the order to the extent that it permits any documents to be withheld in whole or in part.[4] After careful review of the documents concerned, we conclude that the six documents whose disposition the Government appeals may properly be withheld under an exemption to the FOIA; with regard to the documents whose disposition Chamberlain appeals, we affirm.[5] The district court's order is, therefore, affirmed in part and reversed in part.

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[3] The district court's opinion and order are reported as *Chamberlain v. Alexander*, S.D. Ala., 1976, 419 F.Supp. 235. On August 18, 1976 the district court entered supplemental findings of fact and a supplemental order which are reported at 76-2 U.S.T.C. ¶ 9638 (S.D.Ala., 1976).

[4] Pursuant to a request by the court at oral argument the parties have submitted a joint written list of those documents whose disposition by the district court is challenged. Many of the documents and materials covered by the district court's order are not included in the joint list. We assume that this list represents the parties' final statement regarding the documents involved in this appeal. As to all the documents or materials covered by the district court's order and not mentioned in the joint list, we conclude that the parties are satisfied with the district court's decision and, accordingly, we do not consider such documents or materials in this appeal. As to them, we leave the district court's order undisturbed.

[5] The nine exemptions to the FOIA's disclosure requirements are listed in 5 U.S.C. § 552(b); in this case the documents are covered by Exemptions 3, 5, 6 or 7, 5 U.S.C. §§ 552(b)(3), (5), (6) or (7).

The Facts:

The present litigation began with events that took place principally in 1965 and 1966. Chamberlain was then the sole general partner of Citronelle-Mobile Gathering System Company, Ltd. (Citmoco), an Alabama partnership located in Mobile. During 1965 and 1966 Chamberlain authorized Citmoco to pay Public Relations Counsel, Inc., a public relations firm, approximately $17,000 for services performed for a candidate for the United States Senate. These political contributions were entered on Citmoco's books in the account for "Legal and Accounting" expenses and were later improperly reported as business expenses on Citmoco's 1966 tax return.

There were several other disputes between Chamberlain and the IRS. A conflict regarding the tax years of 1956 through 1961 was finally ended by settlement in 1971. In 1965 the IRS Audit Division appointed Revenue Agent D. K. Taylor to undertake an investigation of Chamberlain's tax returns beginning with the 1962 tax year. This investigation eventually encompassed the years 1962 through 1968 and the dispute over income taxes due for those years remains unresolved. It was in the context of this broader inquiry that Agent Taylor investigated the treatment as business expenses of the political contributions made in 1965 and 1966.

The suspicion of possible fraud led Taylor to refer the matter to the IRS Intelligence Division in March 1970 for consideration of criminal prosecution. Special Agent A. A. Burch, to whom the case was assigned, concluded his investigation in July 1970 with a recommendation against prosecution and the Intelligence Division withdrew from the case. The civil fraud investigation, however, was unaffected by this withdrawal.

In September 1970, Agent Taylor discovered that due to administrative error, he and the Audit Division had inad-

vertently allowed the statute of limitations for Chamberlain's 1966 tax year to run on July 15, 1970. This caused considerable consternation within the agency since the claimed deficiencies in Chamberlain's 1966 taxes totalled approximately $127,000 and the IRS had already expended considerable time and effort in this regard. A finding of fraud with respect to any part of the 1966 tax return, however, would toll the statute of limitations and permit the assessment of the entire deficiency at any time.[6]

The case was officially referred to the Intelligence Division for the second time in late January 1971 and assigned to Special Agent George A. Bauwens. At the time of this second referral the IRS had undertaken a national investigation of improper deductions of political contributions and Agent Bauwens was associated with the Alabama branch of that investigation known as the "Alabama Project." Although Agent Bauwens' report, submitted August 24, 1971 after a thorough investigation, recommended that Chamberlain be prosecuted for criminal fraud,[7] the Regional Counsel's office ultimately decided against pursuing criminal action.

Meanwhile, the audit of Chamberlain's tax returns and the investigation of possible civil fraud involving the years 1965 and 1966 continued. In September 1972 the IRS notified Chamberlain of a total proposed tax liability of approximately $1.86 million, including $1.7 million in deficiencies for the years 1962 to 1968 and civil fraud penalties of about $158,000 for 1965 and 1966.[8] Chamberlain has challenged the proposed deficiencies and fraud penalties and the case is currently pending in the Appellate Division of the Southwest Region of the IRS.

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[6] *See* 26 U.S.C. § 6501(c)(1) (1976).

[7] *See* 18 U.S.C. § 1001 (1976).

[8] *See* 26 U.S.C. § 6653(b) (1976).

In February 1973 Chamberlain filed an extensive written request with the IRS seeking the disclosure of approximately 400 documents that he claimed were essential to the adequate preparation of his defense to the deficiency and fraud claims. His request included various provisions of the Internal Revenue Manual outlining the IRS' internal operating procedures, as well as investigative files compiled in the course of the tax audit and fraud inquiry. Chamberlain initiated the instant litigation in July 1973 after the IRS declined to disclose most of the requested documents, claiming that they were protected by various exemptions of the FOIA and by the Internal Revenue Code.

There ensued almost three years of sparring during which the IRS released many of the documents sought while Chamberlain eliminated others from contention by narrowing the scope of his request. By March 1976 there remained in dispute only about 91 documents plus various provisions of the Internal Revenue Manual.[9] After a review of detailed affidavits submitted by the IRS describing the concerned documents and an *in camera* inspection of the documents themselves, the district court, pursuant to cross-motions for summary judgment, entered on March 31, 1976 the order which is now before us on appeal. The court's order directed the IRS to disclose all or part of approximately 53 documents and permitted the withholding of approximately 38 documents plus various provisions of the Internal Revenue Manual in their entirety.[10] With respect to each document, the order indicated not only the disposition of the document but also the statutory exemptions

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[9] Because the IRS has maintained multiple files in this case containing duplicates of many documents and because certain reports and summaries incorporate many other documents, it is difficult to state precisely the number of separate documents involved in this litigation. Inevitably, there is some redundancy in a listing of the documents.

[10] *See* 419 F.Supp. at 241-45.

claimed by the IRS and, for those found exempt, the exemptions the court deemed applicable. Most of the documents ordered withheld by the court fell within Exemptions 5, 6 or 7 of the FOIA;[11] Exemption 3 of the Act[12] was found applicable to those documents or parts of documents dealing with third party taxpayers.

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[11] The Freedom of Information Act, as amended, 5 U.S.C. § 552, provides in pertinent part:

(b) This section does not apply to matters that are—

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, ...

[12] At the time of the district court's decision Exemption 3, 5 U.S.C. § 552(b)(3) (1970), protected matters that were

specifically exempted from disclosure by statute; . . . .

The applicable statute in this case was 26 U.S.C. § 6103 (1970) which at that time read:

(a) Public record and inspection.—

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

For regulations promulgated under this section see 26 C.F.R. § 301.6103(a)-1 (1978).

Following the entry of the district court's order, Chamberlain moved the court to amend its judgment to award attorneys' fees under the provisions of 5 U.S.C. § 552(a)(4)(E)[13] and to make supplemental findings of fact to the effect that the second criminal fraud investigation by the Intelligence Division "was commenced and carried out with the intent of concealing, and avoiding the effects of, the fact that the revenue agent who routinely audited Plaintiff's tax returns for the years 1965 and 1966 had inadvertently allowed the civil statute of limitations to expire for the year 1966." With regard to this latter assertion, plaintiff contended that if the second fraud investigation were instituted solely to escape the consequences of Agent Taylor's negligence, the investigation would somehow be "phony" or a "sham" and that, therefore, the documents and information collected in this probe would not be protected under the exemptions to the FOIA. On August 18, 1976 the district court entered an order and amended findings of fact and conclusions of law[14] denying plaintiff's request for attorneys' fees and concluding that the investigation was not initiated or carried out with the intent of concealing or avoiding the consequences of the running of the statute of limitations for 1966.

After the district court entered its orders herein, Congress substantially amended both the FOIA and the Internal Revenue Code in ways that directly affect this litigation. The Government in the Sunshine Act, enacted September 13, 1976, significantly narrowed the scope of Exemption

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[13] 5 U.S.C. § 552(a)(4)(E) provides:

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

[14] *Chamberlain v. Alexander*, 76-2 U.S.T.C. ¶ 9638 (S.D.Ala 1976).

3 of the FOIA,[15] while the Tax Reform Act of 1976,[16] enacted October 4, 1976, completely revised section 6103 of the Internal Revenue Code and created a comprehensive scheme for regulating the release of tax returns and information collected to determine tax liability. New section 6103 in general specifies that tax returns and information collected with regard to establishing the existence or amount of a tax liability shall be confidential. The section then outlines the circumstances in which information may be released to various types of interested parties, including the taxpayer himself. The statute vests in the Secretary of the Treasury the discretion to withhold certain information from the taxpayer whose taxes are at issue where the Secretary determines that the disclosure of such information "would seriously impair Federal tax administration." [17]

The Government contends that 58 of the 63 documents still at issue in this case are protected by section 6103, as amended, in conjunction with Exemption 3 of the FOIA, as amended. It has submitted an affidavit dated April 20, 1977 by the Acting Commissioner of the IRS stating that these 58 documents constitute material covered by the provisions of section 6103 and that their disclosure "would seriously

[15] Pub.L.No. 94-409, § 5(b), 90 Stat. 1241, 1247 (September 13, 1976).

The exemption as amended is codified in 5 U.S.C. § 552(b)(3) (1976) and applies to matters:

> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; . . . .

[16] Pub.L.No. 94-455, Title XII, § 1202(a)(1), 90 Stat. 1520, 1667 (October 4, 1976), codified in 26 U.S.C. § 6103 (1976).

[17] 26 U.S.C. §§ 6103(c) and (e)(6).

impair Federal tax administration." The Government asserts that the five documents not covered by section 6103 are protected by other exemptions of the FOIA.[18] Chamberlain continues to argue that all of the disputed documents should be disclosed in their entirety.

DISCUSSION:

There are five main issues raised on appeal. First, Chamberlain renews his contention that none of the documents and information compiled during the second criminal fraud investigation is exempt because that investigation was somehow a "sham" or illicit. Second, Chamberlain contends that the district court improperly reviewed the documents and inadequately articulated its rationale for the disposition of each document, and that this constitutes reversible error. Third, we must decide whether section 6103, as amended, satisfies the requirements of Exemption 3 of the FOIA, as amended, and, if so, the extent to which it applies to the documents in this case. Fourth, with regard to those documents not covered by section 6103, we must decide whether the district court erred in concluding that they should be withheld in whole or in part under other exemptions to the FOIA. Finally, Chamberlain contends that he is entitled to an award of attorneys' fees.

Chamberlain argues that the IRS undertook the second criminal fraud investigation in order to avoid the consequences of having allowed the statute of limitations on the 1966 tax year to run, and that this investigation was, therefore, improper or illicit. He then asserts that illegal activity by the IRS cannot support a claim of privilege under

[18] The five documents which the Government does not claim are exempt under sections 6103 and 552(b)(3) are 42, 46, 55L, 55M, and 55-O. The district court found that documents 42 and 46 were exempt in their entirety under Exemption 5 and that documents 55L, 55M and 55-O were exempt in part under Exemption 6.

Exemption 5 of the FOIA nor can it constitute "law enforcement" for purposes of Exemption 7 thereof.[19]

The district court, however, found as a matter of fact that the second referral to the Intelligence Division was not made to avoid the effects of the expiration of the statute of limitations. There is ample support in the record for the district court's finding that the first criminal investigation was not a full-scale inquiry and that the second referral was made in the context of the "Alabama Project" to effect a more comprehensive investigation. Our rejection of plaintiff's argument does not, however, depend upon the conclusion that the second investigation was prompted by factors other than the desire to avoid the running of the statute of limitations. If the IRS sought to establish the existence of fraud so as to reopen the entire 1966 tax year, this would not transform an otherwise legal and proper investigation into an illegal inquiry. It is the duty of the IRS to collect taxes and to investigate possible defalcations of taxpayers in the reporting and payment of taxes. Moreover, Chamberlain places an unwarranted emphasis on the Intelligence Division's initial withdrawal from the case, which was merely one step in an internal process of deciding how to deal with a particular case. The Audit Division's inquiry into potential civil fraud continued nevertheless.

Chamberlain's second contention is also without merit. He asserts in effect that the district court adopted inadequate procedures for reviewing the documents and failed to explain satisfactorily the rationale underlying the application of the statutory exemptions to the documents that were withheld. There was no abuse of discretion in the district court's management of this case. On the contrary, the court's review of the documents was more than adequate; it decided the case on the basis of detailed descriptions of the documents, an elaborate index of the exemptions claimed with respect to each document, and the court's own *in camera* inspection of the documents. As required by statute the court considered the potential for segregability[20] of portions of the documents and ordered many documents disclosed in part. The court's order discusses each of the relevant exemptions in general and lists each document individually with the exemptions claimed, indicating either the parts of the document to be disclosed or the exemptions under which the document could be withheld in its entirety.[21] Given the mass of material to be disposed of this procedure was entirely reasonable.

The third issue involves novel aspects of this case. The Government contends that amended section 6103 of the Internal Revenue Code satisfies the requirements of Exemption 3 of the FOIA and that it exempts from disclosure all but five of the documents at issue in this appeal. In deciding this question we must determine which provisions of section 6103 govern this case, whether those provisions are the sort contemplated by Exemption 3, and whether the documents here fall within the ambit of section 6103.

Preliminarily, we note the well-established rule that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S.

[19] Chamberlain relies on cases like *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972); *In re Subpoena to Nixon*, D.D.C., 1973, 360 F.Supp. 1, *aff'd sub nom., Nixon* v. *Sirica*, 1973, 159 U.S.App.D.C. 58, 487 F.2d 700; and *Weissman v. Central Intelligence Agency*, 1977, 184 U.S.App.D.C. 117, 565 F.2d 692, which held that illegal activity cannot enjoy the executive privilege and that an improper and unauthorized investigation cannot constitute a "law enforcement purpose."

[20] 5 U.S.C. § 552(b) provides in pertinent part:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

[21] See the district court's order at 419 F.Supp. 241-45.

696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 165, 95 S.Ct. 1504, 1523, 44 L.Ed.2d 29 (1975); *Fusari v. Steinberg*, 419 U.S. 379, 387, 95 S.Ct. 533, 538, 42 L.Ed.2d 521 (1975). No injustice will be done the parties by this court applying the law as it presently exists, rather than as it was when the district court rendered its decision.

New section 6103 of the Internal Revenue Code was enacted primarily to regulate and restrict access to tax returns and return information [22] by the many government bodies and agencies that routinely had access to such information under former section 6103.[23] Subsection 6103(a) states the general rule that "Returns and return information shall be confidential" and shall not be disclosed except as authorized by the section;[24] "return" and "return information" are defined in subsection 6103(b).[25]

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[22] *See* note 25, *infra*.

[23] *See generally* S.Rep.No.94-938, 94th Cong., 2d Sess., pt. I, pp. 315-318, *reprinted in* [1976] U.S.Code Cong. & Admin.News, pp. 3439, 3744-47.

[24] 26 U.S.C. § 7213 (1976) provides criminal penalties for the unauthorized or improper release of confidential tax information.

[25] 26 U.S.C. § 6103 provides in pertinent part:

> *Confidentiality and disclosure of returns and return information.*
>
> (a) *General rule.*—Returns and return information shall be confidential, and except as authorized by this title—
>
> (1) no officer or employee of the United States,
>
> (2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and
>
> (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii) or subsection (n),
>
> shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions

There is dispute as to which of the substantive disclosure provisions of section 6103 is properly applicable to the instant litigation. The Government contends that subsections 6103(e) and 6103(e)(6) control this case, while Chamberlain argues that subsection 6103(h)(4) is the

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> of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.
>
> (b) *Definitions.*—For purposes of this section—
>
> (1) *Return.*—The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.
>
> (2) *Return Information.*—The term "return information" means—
>
> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, *or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,* and
>
> (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,
>
> but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. (emphasis added)

proper provision.[26] Although each of these subsections ac-

[26] 26 U.S.C. § 6103 further provides in pertinent part:

(c) *Disclosure of returns and return information to designee of taxpayer.*—

The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. *However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.*

. . . . .

(e) *Disclosure to persons having material interest.*—

(1) *In general.*—The return of a person shall, upon written request, be open to inspection by or disclosure to—

(A) in the case of the return of an individual—

(i) that individual

. . . . .

(6) *Return Information. Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.*

. . . . .

(h) *Disclosure to certain Federal officers and employees for purposes of tax administration, etc.*—

. . . . .

(4) *Disclosure in judicial and administrative tax proceedings.*—A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only—

(A) if the taxpayer is a party to such proceeding;

(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;

cords the Secretary discretion to withhold information, the criteria to be applied are different. Subsections (c) and (e)(6) direct the Secretary not to disclose return information to the taxpayer or his designee if he determines that such disclosure "would seriously impair Federal tax administration";[27] subsection (h)(4) provides more narrowly for nondisclosure only if the Secretary determines that disclosure would "identify a confidential informant or seriously impair a civil or criminal tax investigation."

The language and legislative history of section 6103 clearly indicate that subsections (c) and (e)(6) apply in cases in which a taxpayer seeks the disclosure of information relating to his own tax return. These subsections deal respectively with disclosure to the taxpayer's designee and disclosure to persons with a material interest. They give the taxpayer unrestricted access to his own returns, but as to other information or materials collected by the IRS in the course of determining tax liability, availability is con-

(C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or

(D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.

However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation. (emphasis added)

[27] Although the grant of discretion to the Secretary is phrased in the negative in subsection (c) and the positive in subsection (e)(6), the criterion is the same in each. In this respect then the two provisions are functionally identical.

ditioned on the Secretary's determination that such access would not impair tax administration.

Subsection 6103(h), on the other hand, does not pertain to the release of information to the taxpayer himself. Rather it regulates "[d]isclosure to certain Federal officers and employees for purposes of tax administration," and represents but one of a series of provisions governing the release of information to third parties.[28] Subsection (h) permits the Secretary to release information regarding a taxpayer to officials of the Department of the Treasury or the Department of Justice where the taxpayer himself is a party to the proceeding or in specified circumstances where a tax proceeding involving another party raises issues related to the taxpayer's own tax information. Subsection (h) makes no distinction between returns and return information, applying the same criteria for disclosure to both.

Chamberlain argues, however, that subsection (h)(4) which authorizes disclosure "in judicial and administrative tax proceedings" applies to this case since the instant litigation is "a Federal or State judicial or administrative proceeding pertaining to tax administration." He contends that this provision mandates disclosure to him unless the Secretary determines that "such disclosure would identify a confidential informant or seriously impair a civil or

[28] *See, e. g.*, 26 U.S.C. § 6103 in pertinent part:

(g) Disclosure to President and certain other persons.—

. . . . . .

(i) Disclosure to Federal officers or employees for administration of Federal laws not relating to tax administration.—

. . . . . .

(j) Statistical use.—

. . . . . .

(k) Disclosure of certain returns and return information for tax administration purposes.—

. . . . . .

criminal tax investigation." We reject this interpretation. The provision must be read in context; subsection (h) deals with disclosure to federal officials for purposes of tax administration.[29] Subsection (h)(4) merely describes the circumstances in which these officials may disclose confidential information in a judicial or administrative proceeding. Without subsection (h)(4) officials could not use the information as evidence in such proceedings. There is nothing to indicate that the provision was designed to accord a taxpayer automatic access to all information pertaining to his tax liability immediately upon the initiation of such a proceeding.

It is not reasonable to believe that Congress enacted subsections 6103(c) and (e)(6) which specifically address a taxpayer's right to his own tax files, intending that these provisions cease to operate as soon as the taxpayer's tax information becomes either directly or indirectly involved in a judicial or administrative tax proceeding. Such an interpretation would effectively nullify subsections (c) and (e)(6) since they could be circumvented merely by initiating a judicial or administrative proceeding.[30]

Nothing in the legislative history of section 6103 suggest that subsection (h)(4) was intended to govern disclosures of information to the taxpayer himself. On the contrary, the committee reports dealing with subsection (h)(4) discuss only disclosure to third party law enforcement offi-

[29] See the analogous provision governing the disclosure of information to state officials. 26 U.S.C. § 6103(d).

[30] As it is not necessary to a decision in this case, we express no opinion regarding whether an FOIA suit constitutes a "judicial . . . proceeding . . . pertaining to tax administration" within the meaning of section 6103. 26 U.S.C. § 6103(b)(4) defines "tax administration." Since we conclude that subsection (h)(4) applies to third party federal officials, and not to the taxpayer himself, we need not decide whether the instant case involves "tax administration."

cials,[31] while the sections of the committee reports dealing with disclosures to taxpayers with a material interest state that "return information (in contrast to 'returns') could be disclosed to persons with a material interest only to the extent the IRS determines this would not adversely affect the administration of the tax laws."[32]

We, therefore, conclude that subsections 6103(c) and 6103(e)(6) are applicable in this case, and that the proper criterion for the Secretary's exercise of discretion in withholding documents from disclosure is whether "such disclosure would seriously impair Federal tax administration." The next question is whether these subsections are sufficiently specific to satisfy the requirements of Exemption 3 of the FOIA. This provision exempts from disclosure matters which are "specifically exempted from disclosure by statute . . . provided that such statute . . . (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[33] Both the

[31] S.Rep.No.94-938, 94th Cong., 2d Sess., pt. I, pp. 323-326 (1976), *reprinted in* [1976] U.S. Code Cong. & Admin.News, pp. 3439, 3753-56; H.Conf.Rep.No.94-1515, 94th Cong., 2d Sess., pp. 477-78 (1976), *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 4118, 4181-82.

[32] S.Rep.No.94-938, 94th Cong., 2d Sess., pt. I, p. 339 (1976), *reprinted in* [1976] U.S.Code Cong. & Admin.News, pp. 3439, 3768-69; H.Conf.Rep.No.94-1515, 94th Cong., 2d Sess., p. 480 (1976), *reprinted in* [1976] U.S.Code Cong. and Admin.News, pp. 4118, 4184.

[33] For the full text of Exemption 3, as amended, 5 U.S.C. § 552 (b)(3), see note 15, *supra*. Part A of Exemption 3 refers to statutes requiring that "matters be withheld from the public in such a manner as to leave no discretion on the issue"; and has no applicability in the instant case since subsections 6103(c) and 6103(e)(6) vest the Secretary with discretion regarding the release of return information to a taxpayer with a material interest in the information. A number of recent decisions holding that section 6103 satisfies the requirements of Exemption 3 are inapposite to the instant litigation because they involved part A of Exemption

language and legislative history of Exemption 3, as amended, indicate that subsections 6103(c) and 6103(e)(6) qualify for the statutory exemptions to the FOIA.

Part B of Exemption 3 requires only that a statute either establish particular criteria or refer to particular types of matters. Subsections 6103(c) and 6103(e)(6) satisfy both of these tests. The criterion for the withholding of information is whether disclosure would "seriously impair Federal tax administration," and these subsections apply only to a particular type of matter, return information, which is carefully defined by the statute. Subsections 6103(c) and 6103(e)(6) are, therefore, drawn narrowly enough to avoid the evils of unfettered agency discretion with which Congress was trying to deal when it amended Exemption 3. Congress amended this exemption specifically to overrule the result in *FAA v. Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975), which held that section 1104 of the

3, not part B. In these cases, the plaintiffs sought the disclosure of a third party's tax information; as section 6103 absolutely prohibits the release of tax information concerning one taxpayer to another taxpayer who has no material interest in the information, these cases were decided under part A of Exemption 3. *See, e. g., Fruehauf Corp. v. I. R. S. (Fruehauf II)*, 6 Cir., 1977, 566 F.2d 574; *Lobosco v. I. R. S.*, —— F.Supp. ——, 78-2 U.S.T.C. ¶ 9578, 42 A.F.T.R.2d 78-5630 (E.D.N.Y.1978); *Belisle v. I. R. S.*, —— F.Supp. ——, 78-1 U.S.T.C. ¶ 9459, 42 A.F.T.R.2d 78-5059 (W.D. Okl.1978); *Grenier v. I. R. S.*, D.Md., 1978, 449 F.Supp. 834. As subsections 6103(c) and 6103(e)(6) afford the Secretary some discretion in the release of return information, we must decide whether these subsections conform to the requirements of part B of Exemption 3.

Numerous cases found former section 6103 applicable to former section 552(b)(3), but these cases are, of course, not relevant in light of the changes in both sections. *See, e. g., Mason v. Callaway*, 4 Cir., 1977, 554 F.2d 129, *cert. denied*, 434 U.S. 877, 98 S.Ct. 229, 54 L.Ed.2d 157 (1977); *Fruehauf v. I. R. S. (Fruehauf I)*, 6 Cir., 1975, 522 F.2d 284, vacated and remanded, 429 U.S. 1085, 97 S.Ct. 1090, 51 L.Ed.2d 530 (1977); *Tax Analysts and Advocates v. I. R. S.*, 1974, 164 U.S.App.D.C. 243, 505 F.2d 350.

Federal Aviation Act of 1958, 49 U.S.C. § 1504,[34] satisfied the requirements of former Exemption 3.[35] Congress felt that this interpretation of Exemption 3 gave agencies too much discretion to withhold information.[36] Congress did not, however, enact a provision that excluded from the operation of Exemption 3 all statutes that left an agency with discretion over the disclosure of information; it merely required that this discretion be limited to certain defined matters or that it be informed by established criteria.[37] In this respect section 6103 is easily distinguished from section 1104 of the Federal Aviation Act.[38]

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[34] 49 U.S.C. § 1504 provides in pertinent part:

> Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public.

[35] See note 12, *supra*.

[36] *See* H.Rep.No.94-880, 94th Cong., 2d Sess., pt. I, pp. 22-23 (1976), *reprinted in* [1976] U.S. Code Cong. & Admin.News, pp. 2183, 2203-05; H.Conf.Rep.No.94-1441, 94th Cong., 2d Sess., p. 25 (1976), *reprinted in* [1976] U.S.Code Cong. & Admin.News, pp. 2244, 2260-61.

[37] *See generally* Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 1976 Colum. L.Rev. 1029 (1976).

[38] The legislative history provides examples of statutes that Congress thought would satisfy Exemption 3 as amended. H.Rep.No. 94-880, 94th Cong., 2d Sess., pt. I, p. 23. Section 6103 is not among the examples but one of the cited statutes, the Atomic Energy Act of 1954, 42 U.S.C. §§ 2161-66 (1976), is closely analogous to section 6103. It authorizes the Atomic Energy Commission to release "Restricted Data" where it determines that the publication of such data is "without undue risk to the common defense and security." 42 U.S.C. § 2162(a). *See also* 42 U.S.C. §§ 2162(c), 2163, 2164(b) & 2165. These provisions are no more specific or narrow than subsections 6103(c) or 6103(e)(6).

For cases applying statutes analogous to section 6103 to part B of Exemption 3, as amended, *see generally Lee Pharmaceuticals v. Kreps*, 9 Cir., 1978, 577 F.2d 610; *National Commission on Law Enforcement and Social Justice v. CIA*, 9 Cir., 1978, 576 F.2d 1373; *Baker v. CIA*, 1978, 188 U.S.App.D.C. ——, 580 F.2d 664.

It is a well-settled and sensible principle of statutory interpretation that statutes should be reconciled where possible. *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1972). Congress enacted the Government in the Sunshine Act and the Tax Reform Act of 1976 within a month of each other in September and October 1976. It is difficult to believe that Congress enacted a comprehensive scheme for releasing information to taxpayers with the intention that it have no further applicability once the taxpayer files an FOIA suit.[39] Accordingly, we conclude that the provisions of section 6103 dealing with the disclosure of return information to a taxpayer with a material interest therein satisfy the requirements of Exemption 3.

Having decided that Exemption 3 and section 6103 permit the IRS to withhold return information from the taxpayer where the release of the information would seriously impair federal tax administration, we now determine whether the exemption is applicable to the contested documents in this case. We conclude that it is unnecessary to remand this case for further proceedings in the district

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[39] Congress' awareness of the FOIA while working on the Tax Reform Act is demonstrated by the frequent mention of the FOIA in that part of the Senate Committee report dealing with new section 6110 of the Internal Revenue Code, 26 U.S.C. § 6110, which establishes a mechanism for the "Public inspection of written determinations." *See* S.Rep.No.94-938, Part I, 94th Cong., 2d Sess., 303-315. In the report the discussion of this section immediately precedes the discussion of section 6103.

court and, in the interest of judicial economy and efficiency, we have decided to end this litigation here.[40]

The Government contends that, of the approximately 63 documents still at issue, 58 constitute return information [41] whose disclosure would seriously impair tax administration. In the joint written list of documents submitted by the parties on October 26, 1978, Chamberlain stipulated that 42 of these 58 documents do in fact represent return information. The 42 documents as to which the parties are in agreement comprise various intra-agency memoranda analyzing and discussing Chamberlain's tax liability, several summaries of the case, memoranda of interviews with witnesses, assorted agency workpapers dealing with the computation of Chamberlain's taxes, reports by different agents who have worked on the case, and letters or memoranda from one IRS official to another dealing with different aspects of the case. These documents are clearly matters prepared or collected by the Secretary with respect to determining the existence of liability for a tax or penalty.

With regard to the 16 documents that Chamberlain claims are not return information,[42] we disagree and conclude that each of them constitutes return information under section 6103, at least with respect to those parts ordered withheld by the district court.[43] These documents

[40] *See, e. g., Fruehauf Corp. v. I. R. S.*, 6 Cir. 1977, 566 F.2d 574.

[41] *See* definition of "return information" at 26 U.S.C. § 6103 (b)(2), note 25, *supra*.

[42] These include Documents 16A(31), 16A(32), 16A(45)h, 16C (1)c, 16C(1)d, 16C(16)e, 47, 48, 50a, 50c, 52, 55H, 55J, 55N, 55Q, and 55P.

[43] It will be remembered that the district court ordered many documents disclosed in whole or in part. The Government has appealed the order to disclose only as to six documents, and has acquiesced in the balance of the disclosures. Chamberlain has appealed the district court's order insofar as it permitted documents to be withheld in whole or in part. On this appeal, therefore, aside from the six documents in the Government's appeal, we consider only those parts of the documents ordered withheld by the district court. The narrow question here then is whether those parts of the documents withheld by the district court constitute return information and are, hence, protected by section 6103 or whether the propriety of the withholding must be analyzed under another exemption to the FOIA.

[44] 5 U.S.C. § 552(a)(4)(B).

include intra-agency communications regarding Chamberlain's tax liability, memoranda of conferences on that subject, various "sensitive case" reports on this case, the testimony of an important witness before a grand jury, and several reports discussing the tax liability of other taxpayers. The material prepared or collected by the IRS with regard to Chamberlain's potential liability for deficiencies or penalties clearly represents return information. The documents which discuss the tax liability of third party taxpayers constitute return information of those taxpayers. This information is confidential and the Secretary has no authority to disclose it to Chamberlain.

We next consider whether the Secretary has adequately demonstrated that the release of this return information to Chamberlain would "seriously impair Federal tax administration." The FOIA, of course, places the burden of sustaining a decision to withhold information on the agency.[44] In this case, we find that the IRS has sustained its burden by demonstrating that the release of the documents would result in serious impairment of the effort to collect back taxes and penalties from Chamberlain. Virtually all of the documents sought discuss either the facts or law relating to the fraud claim against Chamberlain or the computation of tax deficiencies for the years 1962 to 1968. Release of this information would doubtless be of benefit to him in the preparation of his defense to the various claims against him. Subsections 6103(c) and (e)(6) were designed precisely to avoid the damage to tax collection that would re-

sult from the untimely disclosure of the IRS' files, while allowing the taxpayer to gain access to return information after the Secretary has determined that release of this information would not interfere with tax administration. Accordingly, we find that the Government has established that the disclosure of these documents would seriously impair tax administration. They are, therefore, exempted from disclosure by section 6103 of the Code in conjunction with Exemption 3 of the FOIA.

The fourth major part of this appeal concerns the five documents which are not return information.[45] Two of these documents are intra-agency memoranda which discuss cases of improper treatment of political contributions.[46] The district court held that these memoranda could be withheld under Exemption 5 of the FOIA,[47] which creates a privilege for materials constituting part of the deliberative process within an agency. This privilege is necessary to protect the integrity of an agency's decisions by insuring the unhindered exchange of fact and opinion within the agency.[48] These documents represent part of the

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[45] Documents 42, 46, 55L, 55M, 55-O.

[46] Documents 42 and 46.

[47] 5 U.S.C. § 552(b)(5) provides that the FOIA does not apply to matters that are:

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

[48] *See, e. g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975); *EPA v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973); *Pacific Molasses Co. v. NLRB*, 5 Cir., 1978, 577 F.2d 1172; *Robbins Tire & Rubber Co. v. NLRB*, 5 Cir., 1977, 563 F.2d 724, reversed on other grounds, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed. 2d 159 (1978); *Cooper v. Department of the Navy*, 5 Cir., 1977, 558 F.2d 274; *Kent Corp. v. NLRB*, 5 Cir., 1976, 530 F.2d 612, *cert. denied*, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976).

IRS' internal deliberations with regard to the handling of cases involving political contributions and, therefore, the district court's decision to order them withheld was correct.

The final three documents[49] are memoranda on disciplinary proceedings involving various persons within the IRS. The district court ordered these documents disclosed in part with the names and other identifying information excised. This information was withheld under Exemption 6 of the FOIA which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[50] Under Exemption 6 we must balance the privacy interests or personal nature of the information sought against the public interest that would be served by disclosure. *See, e.g., Department of Air Force v. Rose*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2 11 (1976); *Pacific Molasses Co. v. NLRB*, 5 Cir., 1978, 577 F.2d 1172; *Committee on Masonic Homes v. NLRB*, 3 Cir., 1977, 556 F.2d 214.

These disciplinary reports concern the responsibility of various individuals with regard to the running of the statute of limitations on Chamberlain's 1966 tax year. In *Rose*, the Supreme Court found that the summaries of disciplinary proceedings involving cadets at the Air Force Academy constituted "similar files" under Exemption 6 and approved a procedure whereby the files were to be released if the deletion of identifying references was sufficient to protect the privacy interests of the cadets. 425 U.S. at 381, 96 S.Ct. at 1608. In the instant case, we find that the district judge reached a workable accommodation of the IRS employees' privacy interest in avoiding publication of embarrassing personal information and the public's interest in knowing about the conduct of IRS operations. Chamberlain's personal interest in knowing the identities of the persons discussed in the reports adds nothing to the equa-

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[49] Documents 55L, 55M and 55-O.

[50] 5 U.S.C. § 552(b)(6).

tion. *E.g., Pacific Molasses, supra; Masonic Homes, supra.* We, therefore, affirm the district court's order with respect to these three documents.

Finally we consider the question of attorneys' fees. Chamberlain filed a claim for approximately $120,000 in such fees under 5 U.S.C. § 552(a)(4)(E),[51] asserting that he was the substantially prevailing party and, therefore, entitled to payment. The district court rejected this claim in its supplemental order of August 18, 1976. We doubt that Chamberlain should be characterized as having "substantially prevailed" in this action, but we need not resolve the issue since our recent decision in *Blue v. Bureau of Prisons,* 5 Cir., 1978, 570 F.2d 529, disposes of Chamberlain's claim. In that case, we recognized that Blue, a prisoner seeking his prison records, had substantially prevailed,[52] but held that there is no presumption in favor of awarding attorneys' fees in an FOIA case and that such an award is left to the sound discretion of the district judge.

After carefully reviewing the legislative history of the 1974 amendments to the FOIA which added section 552(a)(4)(E), the court concluded that Congress intended the district court's discretion in awarding attorneys' fees to be guided by the four criteria enumerated in the Senate Conference Report.[53] These criteria are: first, the benefit

[51] 5 U.S.C. § 552(a)(4)(E) provides:
The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

[52] 570 F.2d at 533 n.3.

[53] *Id.* at 533; S.Conf.Rep.No.93-1200, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Admin.News, pp. 6285, 6288. Accord, *Nationwide Building Maintenance, Inc. v. Sampson,* 1977, 182 U.S.App.D.C. 83, 559 F.2d 704; *Vermont Low Income Advocacy Council, Inc. v. Usery,* 2 Cir., 1976, 546 F.2d 509.

to the public deriving from the case; second, the commercial benefit to the complainant; third, the nature of the interest in the records sought; and fourth, whether the Government's withholding of the documents had a reasonable basis in law.[54] Application of these criteria to the instant case shows that the district court acted properly in denying attorneys' fees.

First, there is virtually no benefit to the public accruing from this litigation. Chamberlain contends that IRS wrongdoing has been uncovered and publicized. As we have found, in agreement with the district court, that the IRS did not act improperly, this claim has no merit. Regarding the second and third criteria, Chamberlain's personal pecuniary and commercial interest in this litigation is large. He faces a $1.8 million deficiency claim for back taxes and penalties and has sought the documents involved here in order to prepare his defense. He needed no additional incentive to bring this FOIA suit.

Finally, given the number of documents withheld, including all the documents at issue in this appeal, we cannot conclude that the Government's refusal to release the documents was without a reasonable basis in law. Accordingly, we find that the district court properly exercised its discretion in denying Chamberlain's claim for attorneys' fees.

Conclusion:

To summarize our disposition of the issues raises on appeal, we find that the IRS' investigation of possible fraud regarding Chamberlain's tax liability for 1965 and 1966, including the second referral to the Intelligence Division, was proper and within the IRS' field of competence and responsibility. There can, therefore, be no proper contention that the documents collected in the course of the investigation are not protected by the FOIA exemptions.

[54] *Id.* at 533-34.

Second, the procedures adopted by the district court to deal with the mass of documents involved were reasonable and within its discretion. Third, we hold that section 6103 of the Internal Revenue Code, as amended, satisfies the requirements of Exemption 3 of the FOIA and permits the Secretary to withhold return information concerning a taxpayer from that taxpayer if he determines that such disclosure would "seriously impair Federal tax administration." We further find that in this case all of the documents claimed by the Secretary to be return information are, at least insofar as they remain undisclosed, in fact return information and that the Secretary has adequately demonstrated that their release would seriously impair tax administration. We, therefore, affirm the district court's order to the extent that it ordered withheld those documents or parts of documents claimed by the Government to be return information and reverse the district court's order to disclose the six documents whose disclosure the Government contests on this appeal.

With regard to the five documents not claimed to be return information by the Government and withheld in whole or in part by order of the district court under Exemptions 5 or 6, we affirm the district court's order. Finally, we hold that the district court did not abuse its discretion in denying Chamberlain's request for attorneys' fees.

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2336

BART B. CHAMBERLAIN, JR., ETC.,
Plaintiff-Appellee-Cross Appellant,

versus

JEROME KURTZ, Commissioner of Internal Revenue, ET AL.,
Defendants-Appellants-Cross Appellees.

June 15, 1979

Appeals from the United States District Court for the Southern District of Alabama

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Before JONES, AINSWORTH and HILL, Circuit Judges.

IT IS ORDERED that appellee's motion for leave to file petition for rehearing out of time is granted and, upon consideration, the petition for rehearing is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT, S. D. ALABAMA, S. D.

Bart B. CHAMBERLAIN, Jr., etc., *Plaintiff*,

v.

Donald C. ALEXANDER, etc., et al., *Defendants*.

Civ. A. No. 7742-73.

March 31, 1976.

Order

PITTMAN, *Chief Judge*.

This cause is before the court on cross motions for summary judgment filed by the parties.

This suit was filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to obtain various documents from officials of the Internal Revenue Service (IRS). The FOIA was amended subsequent to the first hearing on the cross motions for summary judgment. The new amendments became effective on February 19, 1975. The issues raised by the new amendments were briefed by the parties, an additional hearing for oral arguments was held, and the cause was submitted for resolution by the court.

The plaintiff is currently engaged in a dispute with the IRS over his tax liability for certain past tax years. The dispute is now at the administrative level. In early 1973, the plaintiff sought the production of certain documents by the IRS pursuant to the provisions of the FOIA. This suit was instituted when the IRS refused voluntary compliance with the plaintiff's requests.

The plaintiff's application to the IRS contained 17 requests for production of various materials and documents relating to the IRS audit of his taxes. These requests, which form the basis for this action, range from the work papers

of the agents assigned to his case, to numerous intra-agency communications involving possible fraud violations and statute of limitation problems, to sections of the IRS Manual for its agents.

Some of the information requested by the plaintiff has been released to him by the IRS during the course of this litigation. The majority of this disclosed information was released only after persistent efforts on the part of the plaintiff and under orders of this court.

Subsequent to the last reluctant disclosure to the plaintiff, the IRS submitted a large mass of documents to the court for in camera inspection and evaluation of the exemptions from disclosure and a final index. These documents constitute the remaining items in controversy in this action. A "final index" of the documents which appears to be complete was compiled and submitted with the documents tendered to the court along with a statement from the IRS as to why disclosure of the remaining documents has been resisted. The "final index" and the brief "statement of reasons" for resisting disclosure of the documents in controversy are attached to this order as Appendix A and B. It should be noted that Appendix A, the final index, also contains documents which have been released to the plaintiff during the pendency of this action. The IRS has circled the numbers of the documents which are still in controversy and have not been disclosed.

In part I of this order (below) the court discusses the scope and purpose of the FOIA, the statutory exemptions from disclosure which have been asserted in this action, and the burden of proof required with regard to the claimed exemptions. In part II of this order (below), the court sets forth its evaluation of the documents in controversy with regard to the exemptions claimed by the IRS as to these documents. The court's evaluation of specific documents in part II must necessarily be brief because of the amount of documents involved. Accordingly, the evaluation of specific

documents in part II should be read as incorporating relevant portions of the preliminary discussion in part I.

I.

The FOIA was passed by Congress in response to a general dissatisfaction with its predecessor statute, 5 U.S.C. § 1002, which had come to be looked upon more as a withholding device than as a disclosure statute. *EPA v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). The Act sets out in subdivision (a) the types of materials which are to be disclosed. As the Act is structured, "virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions." *NLRB v. Sears, Roebuck and Co.*, 421 U.S. 132, 136, 95 S.Ct. 1504, 1509, 44 L.Ed.2d 29, 39 (1975).

The FOIA has the broad goal of "creat[ing] a judicially enforceable right to secure . . . information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. at 80, 93 S.Ct. at 832, 35 L.Ed.2d at 128. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. A person's rights under the Act, however, are neither decreased nor increased because he claims an interest in the particular agency document sought to be disclosed greater than the interest shared by the average member of the public. *See NLRB v. Sears*, 421 U.S. at 143, 95 S.Ct. at 1513, 44 L.Ed.2d at 43, ftn. 10 and *EPA v. Mink*, 410 U.S. at 79, 93 S.Ct. at 832, 35 L.Ed.2d at 127.

The nine statutory exceptions to the disclosure requirements of the Act are contained in § 552(b), as amended. Since the emphasis of the Act is on disclosure, the material sought must be disclosed unless it is specifically exempted. The exemptions from disclosure are to be "narrowly construed," *Washington Research Project, Inc. v. HEW*, 164 U.S.App.D.C. 169, 504 F.2d 238 (1974), cert. denied 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1974) and the

agency withholding disclosure has the burden of sustaining its action. *Seafarers International Union, AFL-CIO v. Baldouin*, 508 F.2d 125 (5th Cir. 1975), vacated on other grounds, 511 F.2d 1161 (5th Cir. 1975), *Tax Analysists and Advocates v. IRS*, 164 U.S.App.D.C. 243, 505 F.2d 350 (1974). Furthermore, § 552(b) requires that "any reasonable segregable portion of a record" be provided to a requesting party "after deletion of the portions which are exempt under" § 552(b).

In the instant case the defendants have relied variously upon the exceptions set forth in § 552(b)(3), (5), (6), and (7)(A), (7)(C), (7)(D), and (7)(E) (hereinafter exceptions "3, 5, 6, and 7(A), 7(C), 7(D) and 7(E)[1] and upon § 552(a)(2)(C) (hereinafter provision (a)(2)(C))".

The following portion of this order sets forth the statutory language of the various exemptions claimed by the defendants. The quotations are followed by a discussion of the specific exemption.

A. *Exception 3 (§ 552(b)(3))*

> "(b) [The FOIA] does not apply to matters that are—
>
> (3) specifically exempted from disclosure by statute;"

The defendants assert Exception 3 primarily in regard to their contention that there should be no disclosure of portions of certain documents which give the names or information concerning "unrelated" or "third party taxpayers." The defendants assert that this information is protected by §§ 6103 and 7213 of the Internal Revenue Code of 1954, and their implementing Regulations as well as by 18 U.S.C. § 1905. Those provisions deal with the limitation of access

[1] It should be noted that exception 7 was the only exception here involved that was changed by the Amendments to § 552(b). Exceptions 3, 5, and 6 were not changed by the Amendments.

to tax returns and the penalties for disclosure of such information. Although § 6103 does provide for some disclosure of records to certain specified entities for limited purposes, it is the opinion of this court that most of the defendants' Exception 3 contentions are well taken with regard to information in the challenged documents concerning the "unrelated" or "third party taxpayers."

Inasmuch as the court hereinafter under Exception 7 finds the plaintiff is not entitled to disclosure of the Grand Jury testimony on a factual basis, the court does not deem it wise nor necessary to determine the effect of a possible conflict of FOIA and F.R.Crim.P. #6(e).

B. *Exception 5 (§ 552(b)(5))*

> "(b) [The FOIA] does not apply to matters that are—
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

In *NLRB v. Sears, Roebuck and Co.*, 421 U.S. at 146, 95 S.Ct. at 1514, 44 L.Ed.2d at 46-57, the court dealt extensively with Exception 5. The court prefaced its discussion with the following observation:

> Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency. [citation omitted] Since virtually any document not privileged may be discovered by the appropriate litigant, if it is relevant to his litigation; and since the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein, [citation omitted], *it is reasonable to construe Exemption 5 to exempt* those documents, and *only those documents, normally privileged in the civil discovery context.* 421 U.S. at 148, 95 S.Ct. at 1515, 44 L.Ed.2d at 47.

The court has examined the defendants' Exemption 5 contentions with regard to the teachings of *NLRB v. Sears, Roebuck and Co.*, particularly with regard to documents reflecting "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions are formulated." In that regard, the Supreme Court followed the distinction set up by the lower court allowing exemption of pre-decisional communications but requiring disclosure after the decision and designed to explain it. Thus, communications which constitute *final agency disposition* are not exempt under exception 5.

C. *Exception 6 (§ 552(b)(6))*

> "(b) [The FOIA] does not apply to matters that are—
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The defendants assert exemption 6 with regard to a limited number of documents, each dealing with running of the statute of limitations on the plaintiff's 1966 tax return. These documents all concern the acknowledged failure of an IRS agent to protect tax year 1966 against the lapse of the statute of limitations. It has been acknowledged by the defendants that the agent received an official letter of reprimand which has since been destroyed.[2]

Exemption 6 requires a balancing of interests to determine whether disclosure is proper. In *Getman v. NLRB*, 146 U.S.App.D.C. 209, 450 F.2d 670 (1971) the court set forth a balancing test and pointed out that only clearly unwarranted invasions of privacy are prohibited by the exception. The court noted:

> Exception (6) requires a court reviewing the matter *de novo* to balance the right of privacy of affected individuals against the right of the public to be informed; and *the statutory* language "clearly unwarranted" instructs the court to tilt the balance in favor of disclosure. 450 F.2d at 674.

The court has reviewed the documents in light of the balancing test and concludes that disclosure of the nature of the statements in these documents is not prohibited by exception 6 since all parties are aware of the letter of reprimand. These documents contain nothing more that could be considered to be "personal" or "intimate" regarding the agent.[3]

D. *Exception 7 (§ 552(b)(7))*

> "(b) [The FOIA] does not apply to matters that are—
>
> (7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation . . . confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures."

[2] The defendants by brief have acknowledged that this letter was placed in the agent's personnel file in 1966. The letter was destroyed after two years pursuant to the requirements of the Civil Service Commission.

[3] The court does determine that a marked portion of document No. 55G should not be disclosed since that portion deals with a separate individual.

The defendants place their primary reliance on exemption 7 and its subparts for the exemption of the majority of the documents involved in this action.

This exception is the result of extensive amendments. Prior to amendment, the provision provided a broad exception from disclosure for "investigatory *files* compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

The Amendment substituted the word "records" (i.e. documents) for the word "files," thus rendering obsolete prior case law which construed the word "files" to provide a broad basis for nondisclosure under the original version of exemption 7. See e. g., *Ditlow v. Brinegar,* 161 U.S.App.D.C. 154, 494 F.2d 1073 (1974) and cases collected. These cases stood for the proposition that no effort need be made to consider individual documents where the "file" had been compiled in the course of an investigation within the purview of the FOIA.

The insertion of the new word "records" and the qualifying clauses added by amendment to exception 7 have considerably narrowed that exception to the disclosure provisions of the FOIA.

The legislative history of the amendment also indicates that the new version of exemption 7 was enacted to limit the effect of such cases as *Weisberg v. Dept. of Justice,* 160 U.S.App.D.C. 71, 489 F.2d 1195 (1973) which expanded the scope of old exemption 7 to protect past proceedings, and enforcement proceedings not specifically contemplated at the time of the investigation. This court reads the new provision as being in accord with the teaching of *Bristol-Myers v. F.T.C.,* 138 U.S.App.D.C. 22, 424 F.2d 935 (1970), cert. denied 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970), which held that the District Court had a duty to examine "files" there, "records" here, in an investigation exempted by exemption 7 which must be in aid of a "concrete, prospective" proceeding to determine if they are exempt or should be disclosed in a proceeding such as before this court.

This court has been quite concerned with the transcript of the testimony of Jo Ann Flirt before the Grand Jury for the Middle District of Alabama. (Document 16C(1)(d)). The defendants assert Exception 7(A) and 7(C) to bar disclosure of this document.[4]

The plaintiff contends that the questioning of Miss Flirt before the Grand Jury was, in fact, a perversion of the legitimate purpose of the Grand Jury system. Although the chronological presentation of these matters before the Grand Jury with reference to plaintiff's tax controversy creates suspicions as plaintiff contends, the records before the court persuade the court there was not a perversion of the Grand Jury process. The court believes that the transcript should not be disclosed.

D. *Provision (a)(2)(C) (§ 552(a)(2)(C))*

§ 552(a)(2)(C) requires the production by agencies of—

> "administrative staff manuals and instructions to staff that affect a member of the public."

The defendants assert Provision (a)(2)(C) as a bar to the disclosure of portions of the Internal Revenue Manual (IRM).

It should be noted, that Provision (a)(2)(C) is a disclosure requirement rather than an exemption from disclosure. However, the provision deals with disclosure of "administrative" materials and has been construed to exempt

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[4] The defendants also assert Exception 3. See discussion under Exemption 3, supra, rejecting the defendants' reliance on that exemption.

by implication materials that are "law enforcement materials."

In *Stokes v. Brennan*, 476 F.2d 669 (5th Cir. 1973), and *Hawkes v. IRS*, 476 F.2d 787 (6th Cir. 1972), the courts determined that the use of the term "administrative" implies that agency manuals and staff instructions which contain law enforcement materials, as opposed to administrative materials, may be protected to the extent that their disclosure would significantly impede law enforcement.

The defendants contend that the provisions of the IRM here involved are "law enforcement materials" rather than mere "administrative provisions."

It is the opinion of this court that the provisions of the IRM here involved are "law enforcement materials" and should not be disclosed since disclosure of such provisions would expose confidential details of the IRS's enforcement program.

II.

The court now turns to an examination of the documents involved in this action. Part A deals with the documents the court determines should be disclosed in whole or in part. Part B deals with the documents the court determines should not be disclosed. In some cases the defendants have submitted multiple copies of a single document which differ only in the document number assigned to the documents. In these instances the court has grouped the multiple copies together for consideration of the documents as a unit.

A. Documents to be Disclosed in Whole or in Part.

Document Number	Exemption(s) Claimed	Comments
4D	3	Disclose in its entirety—exemption rejected

6	3, 7A	Disclose in part—disclose papers submitted by plaintiff. Exclude rest
8C	3	Disclose in part—exclude marked materials
8D	5, 7A	Disclose in entirety
10F	5, 7A	Disclose in entirety
11 (also submitted as 16A12, 16B1, 16B2)	5, 7A, 7C	Disclose in entirety
13A	5, 7A	Disclose in part—exclude para. 2
13B	5	Disclose in entirety
14E	3, 7C	Disclose in entirety
Note *16C8g* consists of copies of 13A and 13B	5, 7A	Disclose portion of 16C8g corresponding to 13A in same manner as 13A Disclose portion of 16C8g corresponding to 13B in same manner as 13B
14M	5	Disclose only first page
14 O	3	Disclose in entirety
15A	7A, 7D	Disclose in part—exclude name of informant

Document Number	Exemption(s) Claimed	Comments
15L	3	Disclose in part—exclude circled portion
15N (also submitted as 16C8t)	5	Disclose in part—exclude marked sentence
15DD (also submitted as 16C8n)	5	Disclose in part—exclude marked sentence
15MM	5	Disclose in part—exclude marked sentence
16A6 (also submitted as 55I)	3	Disclose in part—exclude marked portions
16A20	5, 7A	Disclose in part—exclude circled portions
16A45a	5, 7A, 7C	Disclose in part—exclude marked portion
16A45h (includes 16A45j, 16C15b,e	5, 7A, 7C	Disclose in part—exclude marked portion
16A46h (included in 16C16g	7A	Disclose in entirety
16B5(W8-4)	7A	Disclose in part—exclude audit workpapers

16C8e	5	Disclose in entirety
16C12a	7A, 7C	Disclose in entirety
16C12b	7A, 7C	Disclose in entirety
16C12c	7A, 7C	Disclose in entirety
1614b	5, 7A, 7C	Disclose routing slip—exclude circled portion. Disclose Form 3948 Exclude Form 2797
1614i	7A, 7C	Disclose all
1614j	7A, 7C	Disclose all
16C14K	7A, 7C	Disclose all
16C15g & f	7A, 7C	Disclose all
16C15j & k	7A, 7C	Disclose all
16C16	7A, 7C	Disclose all
28D	7A	Disclose in part—Disclose workpapers for field in 1959-61
36A	3, 7A, 7C	Disclose all
39	7A, 7E	Disclose all
40	7A, 7E	Disclose all
43	7A, 7E	Disclose all
44	7A, 7E	Disclose in part—exclude marked portions
47	3, 5, 7A, 7E	Disclose in part—exclude only "Proposed Work Plan"

Document Number	Exemption(s) Claimed	Comments
48	3, 5, 7A, 7E	Disclose in part—exclude circled portion
50e	3, 7A, 7E	Disclose in part—exclude names only
55A	6	Disclose all
55E	6	Disclose all
55F	5, 6	Disclose in part—exclude circled portions
55G	6	Disclose in part—exclude circled portions
55K	3, 5, 7A	Disclose in part—exclude name on page 1—exclude final paragraph
55L	6	Disclose in part—exclude marked portion
55M	6	Disclose in part—exclude marked sentences
55N	5, 6, 7A	
55-O	6	Page 2—disclose all Page 3—exclude marked portion
55P	6	Disclose in part—exclude circled paragraph

55Q	6	Disclose in part—exclude first paragraph

B. Documents Withheld

Document Number	Exemption	Comments—Grounds for Withholding
3	5, 7A	Engineering report—per 5 Work papers—per 7A
8	3, 7A	Work papers—per 7A
13 (same as 16B4 and 16A42	5, 7A, 7C	per 5 and 7A
14A	5, 7A	per 7A and 5
15B	7A, 7D	per 7A
15D (Same as 16C8p)	5, 7A	per 7A and 5
15BB	5	5
16A1 (same as 16C84)	3, 5, 7A, 7C	5
16A2 & 16A3	3, 5, 7A, 7C	5
16A5	3, 5, 7A, 7C	5
16A18	5	5
16A19 (also 16C8i)	5, 7A, 7C	5
16A29	5	5
16A31 (also 16C14h, 16B5 (W2-23) 16C11j)	3, 5, 7A, 7C	5, 7A

Document Number	Exemption	Comments—Grounds for Withholding
16A32 (see also 1668m)	5, 7A, 7C	5
16A40	3, 5, 7C	5
16A42 (see also 16C8u)	5, 7A, 7C	5
16A44v (see also 16B3, 16C11L, 16C16j, 16C11k)	5, 7A	5, 7A
16C1c	7A, 7C	7A, 7C
16C1d	3, 7A, 7C	7A, 7C
16C10.b, d, g	7A, 7C	7A
16C141	3, 7A	7A
16C16e (contains 16A45c, e, and 16A461)	5, 7A, 7C	5
21, 21B, 24, 24A, 27	7A	7A
23b	5	5
38	7A	7A
42 46 (supp. to 42)	5, 7A, 7E	5
46 (supp. to 42)	5, 7A, 7E	5
50A, 50B, 50C	3, 5, 7A, 7E	3, 5
52	3, 5, 7A, 7E	5
55H, 55J	7A	7A
IRM (Internal Revenue Manual) See folder B	Provision (a)(2)(C)	Provision (a)(2)(C)

It is therefore ORDERED, ADJUDGED and DECREED as follows:

(1) The documents described in Part II A of this order shall be disclosed to the plaintiff in accord with the directions contained in Part II A in the manner hereinafter detailed.

(2) The documents described in Part II A shall be placed in a sealed file folder with an appropriate identifying designation for a period of thirty (30) days, from the entry of this order.

(3) The folder shall remain sealed for a period of thirty (30) days after which the documents shall be released to the plaintiff unless this action is appealed in which case the documents shall be retained in the folder for consideration by the appellate court.

Costs shall be taxed against the defendants.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 7742-73-P

BART B. CHAMBERLAIN, JR., et al., *Plaintiffs,*

v.

DONALD C. ALEXANDER, etc., et al., *Defendants.*

Order on Plaintiff's Motion for Additional Findings, etc. and for Preservation of Documents

The plaintiff, pursuant to Federal Rules of Civil Procedure, Rules 52 and 59, moves the court as follows:

1. To alter or amend the judgment entered in this cause and award plaintiff's attorneys' fees by virtue of 5 U.S.C. Sec. 552(a)(4)(E).

The Freedom of Information Act initially became effective on July 4, 1967, as an amendment to the Administrative Procedure Act of 1946, 5 U.S.C. § 1002, *et seq.* Periodically evaluated since that date, the 93rd Congress on November 21, 1974, approved extensive amendments to the Act which included, *inter alia,* the addition of (a)(4)(E) which provides:

> "The Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."

Plaintiff contends that the production of documents as ordered by this court and the assessment of costs against the defendant is evidence that the plaintiff has "substantially prevailed" in his action. The reading of the attorney fees section by this court clearly indicates not only that

both the award of fees and costs are discretionary with the court but also that one can be awarded without the other.

To reach this conclusion, the intent and legislative history behind the amendments should be reviewed. The primary purpose of the Act is "to inform [the] public about agency action and not to benefit private litigants," *N.L.R.B. v. Sears, Roebuck and Co.*, 421 U.S. 132 (1975). It is obvious that the intent of the Act was to rectify the use of the Administrative Procedure Act of 1946 by agencies as a shield rather than a provision justifying disclosure of documents. *Seafarers Union AFL-CIO v. Baldovin*, 508 F.2d 125 (5th Cir. 1975); 2 *U.S. Code Congressional and Administrative News* 89th Congress 2418 (1966). House Report No. 93-876, in reciting the purpose behind the 1974 addition of attorney fees to the FOIA states:

> "The allowance of a reasonable attorney's fees out of government funds to prevailing parties in litigation has been considered desirable when the suit advances a strong congressional policy." 1974 U.S. Code Cong. and Admin. News. Vol. 3, p. 6272.

The original version of the bill proposed by the House Committee on Governmental Operations required that in order for the federal court to exercise its discretion in awarding either fees or costs, it was only necessary that the federal government had not prevailed; the Senate version of the bill required the plaintiff to "substantially prevail." *Id.* at 6288. The Senate amendment contained additional statutory criteria to be considered when awarding fees, including:

> "the benefit to the public deriving from the case, the commercial benefit to the complainant and the nature of his interest in the Federal records sought, and whether the Government's withholding of the records sought had a 'reasonable basis in the law.'" *Id.* at 6288.

These considerations were, however, deleted from the version that is now law, not because of the disapproval in their concept but rather because the Conference committee members "believe[d] that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria [would be] too delimiting and is unnecessary." *Id.* at 6288. This court therefore, in addition to looking to the requirement that the plaintiff must "substantially prevail" in his action, has considered the additional factors in the case law as recognized by Congress as guidelines.

The court finds little if any public benefit was derived as a result of the plaintiff's litigation. The documents sought were not revealing of any IRS policies affecting a class of persons whose constitutional rights had been violated nor would disclosure of the documents be of any particular interest to the general public. Rather, they related solely to the plaintiff and his personal and commercial interests. Further, the fact the Government prevailed in their claim of non-disclosure on 150 of the 200 documents indicates the assertion of non-disclosure had "a reasonable basis in law."

Accordingly, the plaintiff's motion for amendment of the judgment and award him attorneys' fees is denied.

2. A protective order requiring each and every document not ordered produced to plaintiff is hereby granted. It is hereby ordered that each of said documents be placed in sealed file folders and held in the custody of the Clerk of this court until after the time for appeal of this case is passed, and that all such documents be considered as part of the record on appeal, but only for the *in camera* inspection of the Appellate Court or as they may otherwise order.

3. The motion for the court to make additional findings of fact to its March 31, 1976 order is granted by making additional findings but not granting the relief the plaintiff seeks.

Attached to this order is Appendix A, a copy of the amended findings of fact, which is incorporated and made a part hereof the same as if set out at length.

Done, this the 18th day of Aug., 1976.

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 7742-73-P

BART B. CHAMBERLAIN, JR., et al., *Plaintiffs*,

v.

DONALD C. ALEXANDER, etc., et al., *Defendants*.

Amended Findings of Fact and Conclusions of Law Made on Plaintiff's Motion

The plaintiff asks for the additional finding that

> "[t]he investigation of Plaintiff by the Intelligence Division of defendant Internal Revenue Service, beginning in December 1970, was commenced and carried out with the intent of concealing, and avoiding the effects of, the fact that the revenue agent who routinely audited Plaintiff's tax returns for the years 1965 and 1966 had inadvertently allowed the civil statute of limitations to expire for the year 1966. An Intelligence Division investigation of the same matters had previously been conducted between March 24 and July 8, 1970. That investigation resulted in a determination that there was no basis for a fraud action against Plaintiff. The running of the statute of limitations occurred, as did the concerned revenue agent's report of that fact, after the first investigation began in December 1970."

Plaintiff reasons that because the December 1970 investigation was initiated only because of the IRS agent's negligence, the investigation was not a true criminal investigation and therefore the information collected pursuant to the December probe does not come within the (b)(7) disclosure exception.

This court, of course, has the discretion to amend or supplement its findings of fact. F.R.Civ.P. 52(a); *Pocahontas Coal and Coke Co. v. Cook*, 74 F.2d 878 (4th Cir. 1935). This court has reviewed the evidence presented to it by the parties regarding the propriety of the December 1970 IRS investigation, including the documents reviewed during the *in camera* hearing, and concludes that the investigation was not initiated or carried out with the intent of concealing, nor just to avoid the effects of the expiration of the civil statute of limitations for the year 1966.

Done, this the 18th day of August, 1976.

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 7742-73-P

BART B. CHAMBERLAIN, JR., et al., *Plaintiffs*,

v.

DONALD C. ALEXANDER, etc., et al., *Defendants*.

Order on Plaintiff's Objection and Motion to Strike Defendants' Motion Taxing Costs Against the Defendants
and
Order on Defendants' Motion Re Taxing of Costs

On this, the 18 day of Aug., 1976, this court has entered an order amending its March 31, 1976, Findings of Fact and Conclusions of Law, and amending the judgment ordered on the same date.

The defendants' objections to the taxing of costs is considered as refiled as of this date to the amended orders. The defendants' objection and the plaintiff's motion concerning costs are considered refiled this date.

The plaintiff's objections and motion to strike the defendants' motion is DENIED.

The defendants' motion to review the taxing of costs to the defendants is hereby DENIED.

Done, this the 18 day of August, 1976.

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 7742-73-P

BART B. CHAMBERLAIN, JR., et al., *Plaintiffs*,

v.

DONALD C. ALEXANDER, etc., et al., *Defendants*.

Amended Judgment

The judgment heretofore entered in this case is hereby AMENDED to include the additional findings of fact to the March 31, 1976, order.

Done, this the 18 day of August, 1976.

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

APPENDIX D (1)

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 7742-73-P

BART B. CHAMBERLAIN, JR., etc., *Plaintiff*,

v.

DONALD C. ALEXANDER, et al., *Defendants*.

Order

The plaintiff has brought this action against the defendants under Section 3 of the Administrative Procedure Act, as amended, 5 USC § 442, (1970) usually referred to as the Freedom of Information Act, seeking preliminary and final injunction against the defendant from withholding certain information and documents from the plaintiff. He alleges that a tax proceeding is in progress against him and in order that he may proceed with adequate preparation of his defense and the hearing of the tax case, it is essential that he be provided with certain information and documentary evidence presently within the knowledge, possession, custody or control of the Internal Revenue Service.

The plaintiff has propounded thirty-six interrogatories to DONALD C. ALEXANDER, Commissioner of Internal Revenue, many of which contain numerous subdivisions. The defendant ALEXANDER has filed his answers and amended answers. The plaintiff has filed a motion to compel discovery and to impose sanctions and an amended motion thereto alleging the defendant, DONALD C. ALEXANDER, objected to answering interrogatories numbered 1 through 14, 16, 17 and 18, objected to and answered only in part interrogatories numbered 22, 24, 25, 27, 28, 29, 31 and that he insufficiently answered interrogatories 15D, 23, 26, 30, 35 and 36.

The defendant contends that the information in documents sought by the plaintiff in the interrogatories are irrelevant and immaterial and having no relationship to the issue in the law suit and further, the existence of identifiable agency records and their exemption or lack of it under the Freedom of Information Act.[1]

It was the clear intention of Congress that the obligation to produce records mandated by the Freedom of Information Act is to be construed broadly and the exemptions thereunder narrowly. The Act makes disclosure the rule and secret the exception. *Ethel Corporation vs. EPA*, 478 F.2d 47 (4th Cir. 1973). The Fifth Circuit said in *Stokes vs. Brennan*, 476 F.2d 699 (1973):

> "The Act was intended to increase public access to such records through the imposition of liberal disclosure requirements limited only by specific, narrowly construed exemptions."

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[1] 5 USC § 552

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

The defendant has merely alleged in general terms that the information or documents sought by the interrogatories come within the exemptions of the Act. He has failed to specify in detail which documents or portions thereof are disclosable and which are within the exemption. The defendant has placed the court in a position where it is impossible for the court to determine which of the documents and information, if any, fall within the exemptions of the Act. Section 552(3) places the burden on the agency to sustain its action in refusing to produce identifiable records.

The defendant is hereby ORDERED to prepare and file with the Court within twenty-one (21) days from the date of this order a detailed analysis of all documents claimed to be exempt from disclosure in manageable segments which shall not contain factual descriptions, that, if made public, would compromise the secret nature of the information, but could ordinarily be composed without excessive reference to the actual language of the document. *Vaughn vs. Rosen*, 484 F.2d 820 (DC C.A. 1973); *Environmental Protection Agency vs. Mink*, 410 U.S. 73 (1973). It is only after a careful consideration of the analysis of the particular documents in question that the Court can determine whether or not the exemptions claimed by the defendant are well taken.

DONE at Mobile, Alabama, this 12 day of April, 1974.

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

APPENDIX D (2)

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 7742-73-P

BART B. CHAMBERLAIN, JR., etc., *Plaintiffs*,

v.

DONALD C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE, ET AL., *Defendants*.

Memorandum

This case was filed July 5, 1973. The defendants have been very slow in responding to discovery. In the pretrial response for the pretrial set for this date, in the statement of defenses it was repeatedly set out "many of the documents," "certain of the documents," "a number of the documents," "some of the requests," without identifying the requests or the documents related thereto.

In a letter with an accompanying response, addressed to the court by the defendants dated June 5, 1974, it was stated that "in the near future" detailed information would be supplied in support of a motion for summary judgment.

In the light of the nature of this suit, which is to obtain disclosure under a statute, and the slowness which the defendants have responded for a period of one year, including the response filed this date, the defendants are granted to July 8, 1974, to file their motion for summary judgment, together with the detailed information which is to include an enumeration of those matters referred to in their statement of defenses in their response to the preliminary pretrial order above referred to.

Failure by the defendants to file a comprehensive response on or before July 8, 1974, will subject them to de-

fault judgment, contempt of court, or such other remedies as provided by the law which the court may deem appropriate. This response is to make a detailed answer to the plaintiff's reply filed May 22, 1974, wherein objections are specifically enumerated.

Discovery is extended for all parties to August 9, 1974. Witnesses' names are to be exchanged on or before August 19, 1974.

The plaintiff's response to the motion for summary judgment is to be filed on or before July 19, 1974.

The motion for summary judgment is set for hearing on Thursday, August 22, 1974.

If the plaintiff desires to file a counter-motion for summary judgment, it is to be made part of his response to the defendant's motion for summary judgment as above set out. This may be amended on or before August 15, 1974.

The movants in the motion or counter-motion for summary judgment are to file a Findings of Fact and Conclusions of Law on or before August 19, 1974.

Done, this the 6th day of June, 1974.

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

APPENDIX D (3)

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 7742-73-P

BART B. CHAMBERLAIN, JR., *Plaintiff*,

v.

DONALD C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE, ET AL., *Defendants*.

Memorandum

This court's memorandum of June 6, 1974, is AMENDED.

The defendants' letter of August 9, 1974, has occasioned another delay in this case. On this, the 19th day of August, 1974, an informal hearing was held on the defendants' letter of August 9 and plaintiff's letter of August 14 in response thereto.

The defendants are to furnish the court forthwith, to wit, by 5:00 p.m. on August 21, 1974, with the documents proposed in plaintiff's Appendix B attached to plaintiff's memorandum filed August 15, 1974, for in camera inspection. The plainitff is granted to September 3, 1974, to amend its previous Appendix B.

The plaintiff's further response to the motion for summary judgment is to be filed on or before September 12, 1974. The plaintiff may amend its counter-motion for summary judgment on or before September 12, 1974. The Findings of Fact and Conclusions of Law are to be filed by the plaintiff on or before September 12, 1974.

Done, this the 19th day of August, 1974.

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
AUG 9 1979
MICHAEL RODAK, JR., CLERK

No. 78-1892

In the Supreme Court of the United States

OCTOBER TERM, 1978

BART B. CHAMBERLAIN, JR., PETITIONER

v.

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1892

BART B. CHAMBERLAIN, JR., PETITIONER

v.

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The sole question presented in this Freedom of Information Act (FOIA) case is whether the court of appeals correctly held that certain Internal Revenue Service documents were "specifically exempted from disclosure by statute" within the meaning of Exemption 3 of the Act (5 U.S.C. 552(b)(3)).

The pertinent facts are as follows: Petitioner brought suit under FOIA seeking disclosure of a wide range of materials compiled during an audit of his tax liabilities for various years which included criminal and civil fraud investigations of his returns for 1965 and 1966. On cross motions for summary judgment, the district court reviewed affidavits describing the documents and made an *in camera* inspection of the documents themselves. The

court then directed that some documents be disclosed in their entirety, some be disclosed in part and withheld in part, and some be withheld entirely (Pet. App. 1a-2a, 31a-47a). While the case was pending in the court of appeals, Congress substantially amended both FOIA and the Internal Revenue Code. The Government in the Sunshine Act significantly narrowed the scope of Exemption 3 of FOIA. Pub. L. No. 94-409, Section 5(b), 90 Stat. 1247. The Tax Reform Act of 1976 completely revised Section 6103 of the Internal Revenue Code (26 U.S.C.) to create a comprehensive scheme for regulating the release of tax returns and information collected to determine tax liability. Pub. L. No. 94-455, Section 1202(a)(1), 90 Stat. 1667 (Pet. App. 7a-8a).

Exemption 3 now exempts from disclosure any matters that are specifically exempted from disclosure by statute provided that such statute either (a) leaves no discretion on the issue or (b) "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3). The amended version of Section 6103 of the Internal Revenue Code generally provides that tax returns and information collected to determine liability shall be confidential. The statute then sets forth the circumstances in which information may be released to various types of interested parties, including the taxpayer himself. The statute vests in the Secretary of the Treasury the discretion to withhold certain information from the taxpayer whose taxes are at issue when the Secretary or his delegate determines that the disclosure of such information "would seriously impair Federal tax administration." Section 6103(c) (see Pet. 4-6).

In the court of appeals, the government submitted an affidavit of the Acting Commissioner of Internal Revenue stating that the bulk of the documents at issue were material covered by Section 6103 and that their disclosure

"would seriously impair Federal tax administration" (Pet. App. 8a-9a). The court of appeals held that Section 6103 satisfied the specificity requirements of Exemption 3 and found that the Commissioner had adequately demonstrated that release of the disputed documents would seriously impair federal tax administration. The court accordingly upheld the Commissioner's refusal to release the documents (Pet. App. 12a-24a).

1. The court of appeals correctly held that disclosure of the documents at issue would seriously impair federal tax administration within the meaning of Section 6103(c) and (e)(6) of the Internal Revenue Code and that the documents therefore are exempt from disclosure under Exemption 3 of FOIA.[1] Section 6103 of the Internal

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[1]Section 6103(c) provides that the Secretary of the Treasury may disclose returns and return information to the taxpayer himself or to the taxpayer's designee, unless the Secretary "determines that such disclosure would seriously impair Federal tax administration." Section 6103(e)(6) permits disclosure to such persons "if the Secretary determines that such disclosure would *not* seriously impair Federal tax administration." (Emphasis supplied.)

Thus, while "the grant of discretion to the Secretary is phrased in the negative in subsection (c) and in the positive in subsection (e)(6)" (Pet. App. 15a n.27), the court of appeals correctly observed that "the two provisions are functionally identical" (*ibid.*). In actual practice, the Internal Revenue Service has in effect adopted the procedure set out in subsection (c), *i.e.*, it permits disclosure of all return information, under circumstances otherwise sanctioned by Section 6103, absent an affirmative determination that disclosure would seriously impair tax administration.

See also *Long* v. *United States Internal Revenue Service*, 596 F. 2d 362 (9th Cir. 1979), and *Fruehauf Corp.* v. *Internal Revenue Service*, 566 F. 2d 574, 577-578 (6th Cir. 1977), holding that Section 6103 of the Internal Revenue Code is a statute within the compass of Exemption 3, although Section 6103(c) and (e)(6) were not directly in issue.

The following cases have upheld the Commissioner's refusal to disclose return information under Section 6103, but without analysis

Revenue Code is a statute within the compass of Exemption 3. As amended in 1976, Exemption 3 requires that a statute either establish particular criteria or refer to particular types of matters. As the court of appeals ruled, Section 6103 satisfies both of these tests. The criterion for the withholding of data is whether disclosure "would seriously impair Federal tax administration." Section 6103(c). Moreover, the statute applies only to a particular type of matter, "return information," which is defined as any data collected in the course of determining a taxpayer's tax liability. Section 6103(a) and (b)(2). Hence, the court of appeals correctly held that the provisions of Section 6103 are "drawn narrowly enough to avoid the evils of unfettered agency discretion with which Congress was trying to deal when it amended Exemption 3" (Pet. App. 19a).

Finally, the facts of this case amply justify the court of appeals' conclusion that disclosure of the documents sought by petitioner would seriously impair federal tax administration. As the court observed, the documents in question discuss either the facts or law relating to the fraud claim against petitioner, release of such information would doubtless be of benefit to him in preparing his defense, and the applicable provisions of Section 6103 were designed "precisely to avoid the damage to tax collection that would result from the untimely disclosure" of such information (Pet. App. 23a-24a).

2. Petitioner first argues (Pet. 13-17) that Exemption 3 does not encompass Section 6103 because the latter provision confers excessive discretion on the Secretary of

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of either subsections (c) and (e)(6) or of Exemption 3: *Anastas* v. *United States*, Civ. No. C-78-2823 (N.D. Cal. May 17, 1979); *Barney* v. *IRS*, Civ. No. 78-5100 (D. S.D. May 16, 1979); *Rizzo* v. *IRS*, Civ. No. 77-6479-Civ-JG (S.D. Fla. March 29, 1979); *Simons* v. *Semrick*, Civ. No. H-77-1487 (S.D. Tex. Aug. 18, 1978); *United States* v. *Finch*, No. 77-M-239 (D. Colo. Nov 4, 1977).

the Treasury to refuse disclosure. But the legislative history shows that Section 6103 is precisely the type of discretionary statute contemplated by Congress in enacting the amendment to Exemption 3. As an example of the type of statute that would qualify under the amended exemption, the House Committee on Government Operations cited the Atomic Energy Act of 1954, Pub. L. No. 703, Sections 141-146, 68 Stat. 940-943 (42 U.S.C. 2161-2166). H.R. Rep. No. 94-880 (Pt. 1), 94th Cong., 2d Sess. 23 (1976). The structure of that Act is similar in all material respects to the relevant portions of Section 6103 of the Internal Revenue Code. The Atomic Energy Act provides for declassification and publication of "Restricted Data" when this can be done "without undue risk to the common defense and security." "Restricted Data" is defined as any data concerning atomic weapons and special nuclear material. Other portions of the Act limit access of government employees to "Restricted Data" and provide security restrictions, just as Section 6103 provides detailed restrictions on access to "return information" as defined by Section 6103(c)-(p).[2]

3. Petitioner errs in his further argument (Pet. 18) that the decision of the court of appeals gives the Commissioner "*carte blanche* to exempt from discovery

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[2]The amendment to Exemption 3 was intended to overrule *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975). There, the Court permitted the Administrator of the Federal Aviation Administration to withhold FAA material where disclosure "is not required in the public's interest." The statute in *Robertson* permitted withholding in the absence of a showing that the "public's interest" *required* disclosure. It did not — as did the Atomic Energy Act of 1954, cited with approval by Congress in amending Exemption 3, and Section 6103 of the Internal Revenue Code — carefully define and describe the types of documents that could appropriately be withheld. Moreover, the impairment-of-tax-administration standard of Section 6103 is as specific as the "common defense and security" criterion expressly approved by Congress in amending Exemption 3. H.R. Rep. No. 94-880, *supra*.

virtually any document that he chooses." But as we have pointed out *supra*, the court of appeals upheld the Commissioner only after an independent examination of the documents themselves and of the relevant surrounding facts that showed that "the Government has established" that disclosure would seriously impair tax administration (Pet. App. 24a). Thus, there is no basis for petitioner's characterization (Pet. 21) of the "Fifth Circuit's unquestioning acceptance of the certification presented here" and his complaint that the court of appeals "abandon[ed] its judicial function to" the Acting Commissioner (*ibid.*).

4. Finally, petitioner contends (Pet. 22) that the decision below would "permit concealment of an agency's violations of its own regulations." His argument is based on the premise that the latter stages of the investigation of his tax affairs occurred only because the government hoped to find evidence of fraud in order to permit the reopening of a tax year with respect to which the statute of limitations had otherwise negligently been allowed to run. But, contrary to petitioner's suggestion, the district court found that the second referral to the Intelligence Division of the Internal Revenue Service was not made to avoid the effects of the expiration of the statute of limitations and the court of appeals found "ample support" for the district court's finding. At all events, the court of appeals correctly pointed out that, even if petitioner's allegation were true (Pet. App. 10a), "this would not transform an otherwise legal and proper investigation into an illegal inquiry."[3]

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[3]See *Irons* v. *Bell*, Civ. No. 78-1350 (1st Cir. Mar. 27, 1979) (Exemption 7 of the FOIA protected certain investigatory material from disclosure even if the investigation itself was unjustified).

Petitioner also seeks review (Pet. 27-32) of the denial of his request for an award of attorneys' fees by both courts below. But petitioner acknowledges (Pet. 31) that a few decisions "have flirted with, but rejected" his contention that a citizen who obtains disclosure of any material whatever under the FOIA (even though the data tend only, as here, to serve the claimant's narrow private interest) has acted in the public benefit for fee award purposes. See, *e.g.*, *Cuneo* v. *Rumsfeld*, 553 F. 2d 1360 (D.C. Cir. 1977), and *Blue* v. *Bureau of Prisons*, 570 F. 2d 529 (5th Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1979

Supreme Court, U. S.
FILED
AUG 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1892

BART B. CHAMBERLAIN, JR.,

Petitioner

v.

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1892

BART B. CHAMBERLAIN, JR.,

Petitioner

v.

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY MEMORANDUM

The Government's Memorandum skillfully avoids dealing with the real issues raised by the Petition for Certiorari. Instead, the Government pitches its argument upon an invalid assumption about the factual record and an equally invalid conclusion about a material issue of law.

1. The erroneous factual assumption is that the Court of Appeals "upheld the Commissioner only after an independent examination of the documents themselves and of the relevant surrounding facts that showed that 'the Government has established' that disclosure [of the documents sought by Chamberlain] would seriously impair tax administration"; Memorandum for the Respondents, p. 6.

Nothing in the Court of Appeals' opinion supports the conclusion that that court made any "independent examination" of the documents. Its opinion, instead, leads only to the conclusion that it relied entirely upon the conclusory statement of the Acting Commissioner and, perhaps, the document descriptions provided by the parties.[1]

2. The Government's erroneous legal conclusion is that, if the Court of Appeals had in fact examined the documents in issue, its action would have corrected the abuses of the Acting Commissioner. The Government incorrectly assumes that the Court of Appeals could properly have made an independent determination whether "disclosure of the documents at issue would seriously impair federal tax administration."

The facts in this case suggest precisely why that view of the law is so dubious as to require review by this Court.

The Court of Appeals, unlike the Acting Commissioner, totally lacks the factual information that

[1] The Court of Appeals' opinion reports only that that court examined 16, of all the documents before it, merely to make a preliminary determination whether they were, in fact, "return information." Nothing suggests that any other documents were examined.

would permit it to make an informed determination whether release of documents sought would "doubtless be of benefit to" the document requester. The Court of Appeals did not have before it the information about the proceeding before the IRS that is available to the administrator, or to Chamberlain. The Court of Appeals did not have before it the substantial volume of documents turned over to Chamberlain by the Government prior to judgment in this case; and hence it had not even the limited information about the state of Chamberlain's knowledge that those documents would have given it. The Court of Appeals, unlike the IRS, had absolutely no factual background about the total state of Chamberlain's knowledge such as to permit it to make the independent determination whether, or to what extent, any information produced by the Internal Revenue Service would "benefit" Chamberlain in preparation of his case before the agency. Unlike the administrator, the Court of Appeals had no basis to determine whether any documents, if produced, would create "damage to tax collection."

In any case in which there is a demand for disclosure of documents, the agency has in its possession, and the requester may have in his possession, a substantially broader fund of information and of documents than that made available to a court in a record that deals solely with the limited number of documents remaining in dispute.

It is precisely this fact, that a substantial informational gap must exist in the knowledge of any court, that suggests why mere conclusory administrative refusals to produce, based on 26 U.S.C.

§6103(c) or (e)(6), are inappropriate. A rational disposition within the intent of the statute can be achieved only by requiring the administrative officer to present to the Court, for review, a decision supported by stated factual grounds, so that the Court of Appeals is able to review, not the documents which tell only a part of the story, but the decision of the administrator.

The Government, however, argues that this Court need not be concerned with blind judicial acceptance of conclusory statements by the Commissioner, because it may rely instead upon the astigmatic consideration given to only a skewed portion of the entire picture by a reviewing court.

Respectfully submitted,

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